TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 559

JOHN PATRICK HENRY, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 4, 1958

CERTIORARI GRANTED FEBRUARY 24, 1959

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 12306

UNITED STATES OF AMERICA, Plaintiff-Appellant,

vs.

JOHN PATRICK HENRY and ALBERT RUDOLPH PIEROTTI, Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

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APPENDIX.

1

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 57 CR 355) • •

STATEMENT PURSUANT TO RULE 12(c) OF THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

(Filed May 21 1957)

On May 21, 1957 the defendants, John Patrick Henry and Albert Rudolph Pierotti, were indicted on one count, charging a violation of 18 U.S.C. 659, in that the defendants did unlawfully possess three (3) cartons of radios, of the value of in excess of $100.00, which said goods had been stolen from an interstate shipment.

On May 23, 1957 the defendants made bail by filing their appearance bonds, and on June 13, 1957 they entered pleas of not guilty to the indictment.

On June 28, 1957 the defendant Pierotti filed a Motion to Suppress Evidence and on September 10, 1957 the defendant Henry filed a like motion.

On October 22, 1957 evidence and arguments were heard and concluded, and an order was entered, denying the motions of the defendants, Pierotti and Henry.

2 On November 25, 1957 the defendant Pierotti filed an amendment to the Motion to Suppress Evidence, and leave was granted the defendant Henry to file a like amendment on November 27, 1957. The Court denied these amended Motions on November 25, 1957.

On January 23, 1958 the case was called for trial before the Honorable Philip L. Sullivan, United States District Judge, and, upon waiver of trial by jury executed by both defendants, evidence was heard.

On January 24, 1958 the Court found both defendants guilty, as charged in the indictment, and each defendant was committed to the custody of the Attorney General for a period of one year and one day.

On January 31, 1958 the defendants Henry and Pierotti filed their Notice of Appeal, and were enlarged on $2,500.00 bonds.

On March 7, 1958 the Trial Court entered an order, extending the time to docket and file the record on appeal to April 22, 1958.

/s/ Edward J. Calihan, Jr.
Edward J. Calihan, Jr.
/s/ James P. Piragine
James P. Piragine
Attorneys for Defendants

3 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of January, being the 6th day thereof, in the Year of Our Lord One Thousand Nine Hundred Fifty-Eight and of the Independence of the United States of America, the 182nd Year.

Present:

Honorable Philip L. Sullivan, Chief District Judge
Honorable John P. Barnes, District Judge, Retired
Honorable William H. Holly, District Judge, Retired
Honorable Michael L. Igoe, District Judge
Honorable William J. Campbell, District Judge
Honorable Walter J. La Buy, District Judge
Honorable J. Sam Perry, District Judge
Honorable Win G. Knoch, District Judge
Honorable Julius J. Hoffman, District Judge

Roy H. Johnson, Clerk

William W. Kipp, Sr., Marshal

Friday, January 24, 1958

Court met Pursuant To Adjournment

Present: Honorable Philip L. Sullivan, Trial Judge

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UNITED STATES DISTRICT COURT

• • (Caption—No. 57 CR 355) • •

The May 1957 Grand Jury charges:

That on or about May 13, 1957, at Chicago, in the Northern District of Illinois, Eastern Division,

John Patrick Henry
and
Albert Rudolph Pierotti,

defendants herein, did unlawfully, willfully, knowingly and feloniously have in their possession certain goods and chattels, to wit,

3 cartons of radios,

of a value of, to wit, in excess of $100.00, which said goods and chattels had been theretofore unlawfully stolen, taken and carried away from a motor truck of the Ziffrin Truck Lines, on or about May 13, 1957, at Chicago, Illinois, and which said goods and chattels were then and there in the course of transportation from, to wit, Admiral Corporation, Chicago, Illinois, to, to wit, Bimel Company, Cincinnati, Ohio, all of which said goods and chattels were then and there a part of, then and there constituted, and were then and there moving as an
5 interstate shipment of freight through the Northern District of Illinois, and all of which said goods and chattels were then and there in the care, custody, control and possession of the Ziffrin Truck Lines, a corporation common carrier.

And the said defendants, at the time they had in their possession the said goods and chattels, as aforesaid, at Chicago, in the Northern District of Illinois, Eastern

Division, then and there well knew the same to have been stolen; in violation of Section 659, Title 18, United States Code.

A True Bill:
/s/ John J. Doherty

R. Tieken
United States Attorney

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UNITED STATES DISTRICT COURT

• • (Caption—No. 57 CR 355) • •

MOTION TO SUPPRESS EVIDENCE
(Filed Jun 28 1957)

Your Petitioner, Albert R. Pierotti, respectfully shows that he is one of the Defendants in the above entitled cause, and is charged herein with violation of Section 659, Title 18, United States Code, in that on or about May 13, 1957, at Chicago, Illinois, he did knowingly and feloniously have in his possession certain goods and chattels, to wit, three cartons of radios, which had heretofore been stolen from an interstate shipment.

That on the aforementioned date, your Petitioner was driving a motor vehicle in the City of Chicago, State of Illinois. That on the aforementioned date certain agents of the Federal Bureau of Investigation, whose names are unknown to the Petitioner, curbed the vehicle in which the Petitioner was driving, and seized and obtained from the aforementioned vehicle the goods and merchandise, which is the subject matter of the within
9 indictment, and at the same time seized the keys of said vehicle. Your Petitioner further states that at the time of said search and seizure the aforementioned agents did not have a search warrant, a warrant of arrest, nor any other process for the arrest of your

Petitioner, and your Petitioner further states that the agents of the Federal Bureau of Investigation seized and searched the aforementioned articles prior to placing the Defendant under arrest or informing him of the charge or charges against him until he was taken to the Chicago Office of the Federal Bureau of Investigation. Your Petitioner further states that at the time of said search and seizure he was not in the commission of a violation of the City of Chicago, State of Illinois or any law of the United States of America.

That the aforesaid search and seizure was unwarranted, illegal and void in that it violates the Fourth Amendment of the Constitution of the United States, and the use thereof of any property seized as alleged evidence, infringes upon the privilege against incrimination as guaranteed by the Fifth Amendment of the United States Constitution; that at the time of said search and seizure, said federal officers had no warrant for the arrest of your Petitioner, nor were they possessed of any search warrant or other process authorizing their search of the aforementioned vehicle. Your Petitioner further shows that the United States Attorney intends to use the said evidence, so unlawfully seized, against your Petitioner on the trial of this cause.

Wherefore, your Petitioner prays for an Order by this Court declaring unreasonable, illegal and void the search made in the above entitled action, and precluding the United States Attorney from using the said evidence upon the trial and hearing of this cause.

/s/ Albert R. Pierotti

Petitioner, Albert R. Pierotti

State of Illinois }
County of Cook } ss.

Albert R. Pierotti, first being duly sworn, on oath deposes and says that he is the Petitioner named in the foregoing by him subscribed; that he has read the same, knows the contents thereof, and that the matter and things contained therein are true.

/s/ Albert R. Pierotti

Subscribed and sworn to
before me this 28th day
of June, 1957.
Howard Korengold
Notary Public

Received a copy of the above and foregoing Motion to Suppress Evidence, together with Brief in Support of Defendant Pierotti's Motion to Suppress Evidence, this 28th day of June, 1957.

/s/ R. Tieken E. Tillotson
Robert Tieken
United States Attorney

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IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 57-CR-355). * *

MOTION TO SUPPRESS EVIDENCE
(Filed Sep 10 1957)

Your petitioner, John Patrick Henry, respectfully shows that he is one of the defendants in the above-entitled cause, and is charged herein with violation of Section 659, Title 18, United States Code, in that on or about May 13, 1957, at Chicago, Illinois, he did knowingly and feloniously have in his possession certain goods and chattels, to wit, three cartons of radios, which he had stolen from an interstate shipment.

That on May 13, 1957 your petitioner was a passenger in an automobile being driven in Chicago, Illinois by the co-defendant in this case. That on the aforesaid date, certain agents of the Federal Bureau of Investigation, whose names are unknown to this petitioner, curbed the vehicle in which the petitioner was riding, and seized and obtained from the said vehicle the goods and merchandise, which is the subject matter of the within indictment, and at the same time seized the keys of said vehicle.

12 Your petitioner further states that, at the time of said search and seizure, the aforementioned agents did not have a search warrant, a warrant of arrest, nor any other process for the arrest of your petitioner, and your petitioner further states that the said agents seized and searched the aforementioned articles prior to placing the defendant under arrest, and informing him of the charge or charges against him, until he was taken to the Chicago office of the Federal Bureau of Investigation. Your petitioner further states that at the time of said search and seizure, he was not in the commission of a violation of any law of the City of Chicago, State of Illinois, or the United States of America.

That the aforesaid search and seizure was unwarranted, illegal and void, in that it violates the Fourth Amendment to the Constitution of the United States, and the use of any property seized as alleged evidence infringes upon the privilege against incrimination, as guaranteed by the Fifth Amendment to the Constitution of the United States; that at the time of said search and seizure, the said federal officers had no warrant for the arrest of your petitioner, nor were they possessed of any search warrant, or other process, authorizing their search of the aforementioned vehicle.

Your petitioner further shows that the United States Attorney intends to use the said evidence, so unlaw-
13 fully seized, against your petitioner on the trial of this cause.

Wherefore, your petitioner prays for an order by this Court, declaring unreasonable, illegal and void the search made in the above-entitled action, and precluding the United States Attorney from using the said evidence upon the trial and hearing of this cause.

/s/ John Patrick Henry
John Patrick Henry,
Petitioner.

State of Illinois }
County of Cook } ss.

John Patrick Henry, being first duly sworn on oath, deposes and says that he is the petitioner named in the foregoing, by him subscribed; that he had read the same, knows the contents thereof, and that the matters and things contained therein are true.

/s/ John Patrick Henry

Subscribed and sworn to before me
this 9th day of September, 1957.
/s/ Ruth I. Quinlan
Notary Public

Received a copy of the above and foregoing Motion to Suppress Evidence, this 9th day of September, 1957.

/s/ B. Waters for R. Tieken
United States Attorney

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UNITED STATES DISTRICT COURT

• • (Caption—No. 57 CR 355) • •

GOVERNMENT'S ANSWER TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

(Filed Sep 9 1957)

Now comes the United States by R. Tieken, United States Attorney for the Northern District of Illinois, and in answer to the motion of the defendant, Albert Rudolph Pierotti, to suppress evidence, states as follows:

1. That the Agents of the Federal Bureau of Investigation did not unlawfully arrest the defendant and did not make an unlawful search and seizure.

2. That the defendant does not allege ownership of the vehicle referred to in defendant's petition; neither does petitioner allege any property rights in, or ownership of the property sought to be suppressed.

Wherefore, the Government prays that an order be entered denying the motion of the defendant, Albert Rudolph Pierotti.

/s/ R. Tieken
R. Tieken
United States Attorney

BJW:af

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IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 57 CR 355) • •

TRANSCRIPT OF CERTAIN PROCEEDINGS

(Filed Mar 19 1958)

had in the above-entitled cause before the Honorable Philip L. Sullivan, chief judge of said court, in his court-

Q. What, if anything, did you say to the defend-
37 ants, or either of them, and what, if anything, did they say to you?

A. We asked them about the ownership of the car, and Mr. Pierotti said it wasn't his car, and he said it was Babe's car, and that he had borrowed it. And we asked him about the cartons that were in the car, and he said that they were in the car when he—

The Court: Just a minute. All right, go ahead.

By the Witness:

A. (Continuing) We asked him about the cartons that were in the car, and he said that they were in the car at the time he borrowed it from the owner.

By Mr. Waters:

Q. In response to Mr. Calihan's question you said you checked the ownership of the car. Did you subsequently interview the owner?

A. Yes.

Q. And to whom did he lend that car, if anyone?

A. He loaned the car to Mr. Henry that same day, previously that day.

Q. And not to Pierotti?

A. No.

38 Q. What, if anything, else was said by you to the defendants and by the defendants to you at that time and place?

A. Well, after they said, after Mr. Pierotti said the cartons were in the car at the time he borrowed it, we asked them if they had just been at the Red Top Lounge, and Mr. Henry said that he may have been earlier that day as he was visiting numerous taverns. Mr. Pierotti said he had just got off work at 2:30.

Q. Do you know of your own knowledge whether or not that was correct?

room in the United States Court House, at Chicago, Illinois, on October 22, 1957, namely the testimony of the witness George Stadtmiller.

Hon. Robert Tieken,
United States Attorney,
By: Mr. Bernard J. Waters,
Assistant United States Attorney,
appeared on behalf of the
Government;

Mr. Edward J. Calihan and
Mr. James P. Piragine,
appeared on behalf of the
Defendants.

17 GEORGE STADTMILLER, being first duly sworn, testified as follows:

The Court: What is your name?
The Witness: George Stadtmiller.
The Court: Will you spell the last name?
The Witness: S-t-a-d-t-m-i-l-l-e-r.
The Court: Where do you live?
The Witness: 3249 Kenwood, Hammond, Indiana.
The Court: What is your work?
The Witness: Special agent, FBI.
The Court: How long?
The Witness: 10 years.
The Court: Proceed.

Direct Examination by Mr. Calihan.

Q. Mr. Stadtmiller, calling your attention to on or about May 13, 1957, did you have occasion to make an arrest of the petitioners John Patrick Henry and Albert Rudolph Pierotti?

A. Yes, sir.

A. Well, I had seen him at 2:10 away from work.

Q. What, if anything, happened after that?

A. We told them that it looked like—

Q. Did you subsequently take them to your office at the Federal Bureau of Investigation?

A. Yes. We told them that the cartons looked like they had been stolen and that we had seen—

Q. Pardon me, Mr. Stadtmiller. When you stated you placed them under arrest at or about 4:00 or 4:30 that afternoon, if I recall your testimony correctly, did you refer by that to the placing of formal charges against
39 them with respect to the cartons found in the automobile.

A. Yes. We officially informed them that they were under arrest, and informed them of the charges, after we had determined where the cartons had come from and after we had consulted with the U. S. Attorney's Office.

Q. You did not consult yourself with anybody in the U. S. Attorney's Office?

A. No.

Mr. Waters: Thank you, Mr. Stadtmiller. Nothing further, your Honor.

Redirect Examination by Mr. Piragine.

Q. I believe you testified on cross-examination that you saw petitioner Henry carrying some cartons?

A. Yes.

Q. About 500 feet away?

A. 300.

Q. 300. I am sorry. And you didn't know whether the cartons were full or empty, is that correct?

A. No.

Q. You couldn't read any description of any kind
40 from that distance?

A. No.

Q. Now, at the time that you said to Pierotti that the cartons looked like they were stolen, that was after you

Q. Where did that arrest take place?

A. In the Chicago office, at 212 West Monroe.

18 Q. Chicago office of what??

A. Of the FBI.

Q. What time was that?

A. It was about, oh, five, about 5:00 o'clock, 5:00 P.M.

Q. Now, you state that you made the arrest at that time. When did you first take the petitioners into custody?

A. Well, I asked them to come down to the office about ten minutes to three.

Q. Well, now, prior to ten minutes to three, did you have occasion to stop them in your vehicle?

A. I was in a vehicle.

Q. Who was driving the vehicle?

A. John Oitzinger.

Q. Where were Mr. Pierotti and Mr. Henry?

A. They were in a car.

Q. Did you stop them in your car?

A. Yes.

Q. How was that stop made?

A. They were headed—they were driving south in the 2600 block of Wallace, and we were headed north, and we intercepted their path.

19 Q. You just pulled right in front of them on their side of the street?

A. We started toward them, and then we motioned, I motioned out of the window with my hand, for them to stop.

Q. And did they stop?

A. Yes.

Q. Who was driving the car?

A. Mr. Pierotti.

Q. Where was Mr. Henry?

A. In the front seat alongside of him.

Q. And you were in the car with Mr. Oitzinger who is also an agent of the FBI?

A. Yes.

Q. What, if anything, did you do at that time?

A. I got out of the car and started walking toward the driver's side of their car; and at that time Mr. Henry got out and we exchanged greetings, and I walked alongside the driver's side of the car.

Q. Where was Mr. Oitzinger?

A. He was getting out of the driver's side of our car, and walking toward the passenger side of the car.

Q. Did you then search the vehicle?

A. Well, as I walked alongside of it I looked in the car, and saw that there were cartons in the car.

Q. Cardboard cartons?

A. Yes.

Q. Any markings?

A. Yes.

Q. What type of markings?

A. They had an Admiral shipping label on them, showing that they were going to a company in Cincinnati.

Q. Were they sealed?

A. Two of them were and the flap was open on one of them.

Q. Did you search any place in the car?

A. Well, I looked in the back seat.

Q. How about the trunk?

A. Not at that time.

Q. Did you subsequently look in the trunk?

A. Yes.

Q. When?

A. It must have been about five minutes later.

Q. You just took the keys and opened the trunk?

A. I asked Mr. Pierotti whose car it was, and he said it was someone's named Babe.

21 Q. Did you verify the ownership of the car?

A. Yes.

Q. Was it Mr. Pierotti's car?

A. No.

Q. Was it Mr. Henry's car?

A. No.

Q. It was not in their possession unlawfully, was it?

A. The owner of the car said he had lent it to Mr. Henry.

Q. In other words, their possession of the vehicle was perfectly lawful insofar as you were concerned?

A. Well, as it later developed, yes.

Q Now what, if anything, did you turn up in the trunk of the car?

A. Nothing of any consequence.

Q. Well, what? Was there a carton in there too, of Turtle Wax cleaning material?

A. There was a carton of cleaning material, and a windshield cleaning device in the back seat on the floor.

Q. And did you check that material out to determine whether that was stolen?

22 A. Yes.

Q. And was it?

A. No.

Q. So that, after you searched the car and took these, you say there were three cartons, what, if anything, did you do with those cartons?

A. We asked them if they had—

Q. No. I am sorry. What did you do with the cartons?

A. We took them and put them in the Bureau car.

Q. What did you do with the defendants?

A. We asked them if they would come down to the office, and they got in the Bureau car and accompanied us down to the Chicago office.

Q. You left their car on the street?

A. Yes.

Q. Was it parked then, pulled over to the side?

A. Yes.

Q. What time was this, about 3:00 o'clock?

A. Yes, it was about a quarter to three, ten to three.

Q. And you went down to the Bureau then?

A. I didn't right then. I went down later.

Q. Did you summon the assistance of any other agents in the area?

A. Yes.

Q. When?

A. Shortly after we had stopped their car.

Q. How many units were in the area?

A. I don't know. One came that I know of.

Q. Well, subsequently weren't there more that came?

A. I think there was one came at the Wallace address, and then another one came at, in an alley at Lowe Street.

Mr. Waters: I object to any further questioning along that line. It is immaterial to this inquiry.

Mr. Calihan: Well, your Honor, I think I can develop that there were four cars present at one time with the defendants.

By Mr. Calihan:

Q. Is that true, there were four cars at one time with the defendants?

A. I don't know four cars; there may have been three at one time, but I don't know about four.

Q. Just on the evening prior, let us say the previous night, what, if anything, had occurred in that neighborhood by way of a loss?

A. Well, we had a loss referred to us from the Hayes Freight Lines, at 25th and Canal Streets.

Q. What was the nature of that loss?

A. I believe it was whiskey.

Q. And would it be a fair statement to state that you were in that neighborhood looking for some leads to the whiskey loss?

A. Yes.

Q. And in addition to the vehicle driven by Mr. Henry and Mr. Pierotti, did you stop other cars during that morning at any other time during that period?

A. Did I?

Q. Well, you or your partner, Mr. Oitzinger.

A. Not that I know of. I didn't.

Q. Did either you or Mr. Oitzinger stop a car driven by Mike Condello that morning?

A. Not that I remember.

Q. Do you know Mike Condello?

A. I don't believe I know him.

Q. Did you stop a vehicle driven by Steve Bedlow that morning?

A. I didn't, no.

Q. Do you know if he was stopped?

A. I had heard from another agent that he had been questioned, but I don't know where they questioned him or under what circumstances.

Q. Was that with reference to the Hayes whiskey thing?

The Court: Well, that was by some other agent.

Mr. Calihan: I am sorry. I withdraw the question.

By Mr. Calihan:

Q. Well, now, Mr. Stadtmiller, did you ultimately determine that the cartons which you took from the car were stolen?

A. Yes.

Q. When did you determine that?

A. It was between 4:30 and 5:00 o'clock.

Q. You determined then that they had been taken from the warehouse, from a motor truck of the Ziffrin Truck Lines, is that correct?

A. They told me that they had such a loss.

Q. That was the first time that it was called to your attention?

26 A. Yes.

Q. In other words, you called them and asked them to check; is that my understanding?

A. Yes.

Q. Did you call any other truck lines and ask them to check whether they had a radio loss?

A. Yes.

Q. And more specifically, did you call a Mr. Homer, Ralph Homer, IFC?

A. Holter.

Q. Who is IFC?

A. Indianapolis Forwarding Company.

Q. And he had indicated that they checked through everything and they couldn't find any such loss?

A. He said they had no recent loss of such a commodity.

Q. When did you present this matter to the United States Attorney, at what time?

A. I did not present it myself. Another agent did and—

The Court: That answered the question; he doesn't know.

By Mr. Calihan:

27 Q. If you know, do you know what time it was presented? If you know—if you don't—

A. I don't know. I heard about it shortly after we had determined where the merchandise came from.

The Court: On the same date?

The Witness: On the same day, yes. It would have been within fifteen minutes, ten or fifteen minutes, that is, before 5:00 o'clock.

By Mr. Calihan:

Q. It was presented before 5:00 o'clock, to the best of your knowledge?

A. Yes, to the best of my knowledge it was.

Q. Did you have a warrant for the arrest of either Mr. Pierotti or Mr. Henry at the time you stopped them in the vehicle?

A. No; not at the time, no.

Mr. Calihan: No further questions.

Mr. Waters: Do you have any questions, Mr. Piragine?

Mr. Piragine: No, I have no further questions.

28 *Cross Examination by Mr. Waters.*

Q. Mr. Stadtmiller, when on May 13th, about what time, did you first see the defendants Pierotti and Henry?

A. It was about 2:10 P.M.

Q. Where were they when you first saw them?

A. They were walking across the street from the Red Top Tavern, which is at 2903 South Wallace.

Q. And where did they walk?

A. They walked on the west side of the street, and entered a 1953 black-and-white two-door Ford.

Q. What, if anything, did they do after that?

A. They drove, with Mr. Pierotti driving, they drove to 30th Street, and turned west to Lowe, and then they drove north to 28th Street, and then west to an alley between Union and Emerald.

Q. Did their car come to a stop there?

A. Momentarily.

Q. What, if anything, happened then?

A. Then they backed up and headed back east, and turned north in an alley between Union and Lowe.

Q. When you say their car paused momentarily,
29 was that immediately prior to the entrance into the alley, straddling the pedestrian crosswalk?

A. Yes.

Q. What, if anything, happened after that?

A. After they were in the alley?

Q. After their car started up again from that pause at the pedestrian crosswalk.

A. They backed up and headed east and turned north into an alley between Union and Lowe.

Q. What, if anything, happened there, if you know?

A. Well, then I got out of the Bureau car, and walked to the south end of the alley, and about three-quarters of the way up the alley I saw their car was stopped, parked, and I saw Mr. Henry get out of the car and enter a gangway.

Q. Was Mr. Henry carrying anything when he got out of the automobile?

A. No.

Q. What, if anything, did you see next?

A. About two minutes later Mr. Henry returned from the gangway, and was carrying cartons. He walked around the front of the car and got in this car and the car drove north and turned east on 26th Street.

Q. Could you see who was driving?

A. Mr. Pierotti was still driving.

Q. What, if anything, happened then?

A. Well, we returned to the car we were driving, and drove north on Union Street to 26th, and we didn't see their car; so we drove to Normal Street on 26th, and turned south on Normal to 27th Street, turned west on 27th Street back to Wallace, and we saw the car that they were in parked across from the Red Top Lounge in the original position we had seen it.

Q. Was there anybody in the automobile at that time?

A. No.

Q. What, if anything, happened after that?

A. We parked—

Q. By "we," you refer to yourself and Mr. Oitzinger?

A. Yes. We parked on Wallace Street north of their car, and saw Mr. Pierotti and Henry come out of the Red Top Lounge, and talk with a person we know as Steve Bedlow, in front of the Red Top Lounge for several minutes.

31 Q. What happened after that?

A. Then Steve Bedlow walked north on Wallace, and Mr. Pierotti and Henry returned to the black-and-white Ford with Pierotti driving.

Q. Were they carrying anything?

A. No.

Q. What, if anything, happened after that?

A. They drove to 30th Street, and back north and returned to the alley between Union and Lowe, the same place we had seen them previously.

Q. What, if anything, did you observe at that point?

A. The car stopped, and Mr. Henry got out of the car, and went in the gangway, which would be west of the car, and was gone about two minutes and returned carrying cartons. He got in the car with the cartons.

Q. Did he place those cartons in the automobile?

A. I couldn't see him place them in the automobile, but he walked around the front of the car with the cartons.

Q. About how far away from him were you at that time?

A. About 300 feet.

32 Q. What, if anything, happened after that?

A. They drove north. The car drove north to 26th Street, and turned east. My partner and I got back in our car and drove east on 28th Street to Wallace.

Q. What, if anything, happened after that?

A. Well, as we approached the intersection of Wallace and 28th Street, we saw them heading south on Wallace, so we turned north.

Q. Both automobiles were approaching each other?

A. Yes.

Q. What, if anything, happened after that?

A. As we neared their vehicle we, at least I, waved to them from out of the window.

Q. Mr. Stadtmiller, when you say you waved to them, did both of these defendants know you?

A. Yes.

Q. And you knew them when you saw them?

A. Yes.

Q. You knew Steve Bedlow when you saw these defendants talking to him?

A. Yes.

Q. Had you had previous conversation with the defendant Pierotti and with the defendant Henry?

33 A. Yes.

Mr. Calihan: Objection, if the Court please.

The Court: The answer may stand.

By Mr. Waters:

Q. What was the general nature of those conversations?

Mr. Piragine: Objection.

The Court: Sustained.

By Mr. Waters:

Q. Mr. Stadtmiller, you have testified in response to some questions put to you by Mr. Calihan, that you were in that area in connection with the investigation of a theft of an interstate shipment; that is correct, is it not?

A. Yes, sir.

Q. Had you ever received any information concerning the implication of the defendant Pierotti with interstate shipments?

Mr. Piragine: Object.

The Court: He may answer.

By Mr. Waters:

Q. Will you answer that, please?

The Court: Yes or no.

34 By the Witness:

A. Yes.

By Mr. Waters:

Q. From whom did you receive that information?

A. Mr. Lieberman, vice-president of Ziffrin Truck Lines.

Q. Is Mr. Lieberman the employer of the defendant Pierotti?

A. Yes, sir.

Q. When the defendants recognized you, what, if anything, did they do with their automobile as you approached?

A. They stopped.

Q. And that was in response to your waving your hand?

A. Yes.

Q. What, if anything, happened when they stopped their automobile?

A. Well, Mr. Henry got out of the car and started walking.

Q. Which door did he get out of?

A. The passenger side.

Q. Did he leave that door open or did he close it after him?

35 A. He left the door open.

Q. Did that door remain open?

A. Yes.

Q. What, if anything, happened then?

A. Well, I walked alongside the driver's side, and Mr. Oitzinger walked along the passenger side.

Q. You have testified in response to Mr. Calihan's question that you saw cartons in there, bearing markings

which indicated that they were part of an interstate shipment, is that correct?

A. Yes.

Q. What, if anything, did you say to the defendants, or did either of the defendants say in your presence at that time and place?

A. I asked Mr. Pierotti if that was—

Q. Pardon me, Mr. Stadtmiller, before that. Had you got out of your automobile? Did Mr. Henry say anything immediately after you got out of your automobile and he got out of the passenger side of his automobile, leaving the door open; did he say anything in your presence?

A. To me?

Q. To anyone.

36 A. Well, I was getting out of the car at the same time, but I thought I heard him say to Mr. Pierotti, "Hold it. It is the G's."

Q. Did he say anything to Mr. Pierotti after that, in your presence?

A. Yes.

The Court: Let me see, what was that he said?

The Witness: "Hold it; it is the G's."

The Court: Who was he talking to?

The Witness: Mr. Pierotti.

By Mr. Waters:

Q. Did he address any further remark to Mr. Pierotti in your presence at that time and place?

A. Shortly after he did.

Q. What, if anything, did he say to him then?

A. He said, "Tell him he just picked me up."

Q. At that time did you have a conversation with the defendants Henry and Pierotti?

A. Yes.

Q. Who else was present if anyone?

A. John Oitzinger.

had examined them, is that correct, in the car?

A. I saw them in the car.

Q. You made this statement after you had observed the three cartons in the car, is that correct, and examined them?

A. Yes, sir.

Q. And the description on there which you testified to on direct?

A. Yes.

Q. Is that correct?

A. Yes.

Q. When you made this statement you did not know they were stolen from the Ziffrin Truck Lines, is that correct?

A. No.

Mr. Piragine: That is all.

The Court: Anything further?

Mr. Waters: Nothing further.

(Witness excused.)

41 IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 57 CR 355) • •

CERTIFICATE

I hereby certify that the foregoing 25 typewritten pages, numbered consecutively from 1 to 25, inclusive, are a true and accurate transcript of my original official shorthand notes taken of the testimony given by the witness George Stadtmiller in the above-entitled cause before Honorable Philip L. Sullivan, chief judge of said court, on October 22, 1957.

/s/ Alfred H. Frederick
Alfred H. Frederick
Official Court Reporter
United States District Court
Northern District of Illinois

January 17, 1958

42 UNITED STATES DISTRICT COURT

• • (Caption—No. 57 CR 355) • •

AMENDMENT TO MOTION TO SUPPRESS EVIDENCE

(Filed Nov 25 1957)

Comes now Albert R. Pierotti, Petitioner and Co-Defendant in the above entitled matter, and states that on June 28, 1957 he filed his Motion to Suppress Evidence of the goods and merchandise as alleged in the within indictment, and states as follows: That he was in possession on May 13, 1957 of the within described goods and merchandise as specified in the indictment, and that he had a proprietary interest in said goods and merchandise.

/s/ Albert R. Pierotti
Petitioner
Albert R. Pierotti

43 State of Illinois }
County of Cook } ss:

Albert R. Pierotti, first being duly sworn, on oath deposes and says that he is the Petitioner named in the foregoing by him subscribed; that he has read the same, knows the contents thereof, and that the matter and things contained therein are true.

/s/ Albert R. Pierotti

Subscribed and Sworn to before me
this 25 day of November, 1957.
/s/ Dolores Ladendorf
Notary Public.

(Seal)

138 IN THE UNITED STATES DISTRICT COURT

Friday, April 18, 1958

Present Honorable Michael L. Igoe, District Judge

• • (Caption—No. 57 CR 355) • •

On stipulation of the parties through their respective counsel filed herein on this date, it is

Ordered that the copy of the defendant John Patrick Henry's Amendment to Motion to Suppress Evidence attached to said stipulation may be used herein in lieu of the original of said document, the original Amendment to Motion to Suppress Evidence, filed on November 27, 1957, having been mislaid.

135 IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 57 CR 355) • •

STIPULATION

(Filed Apr 18 1958

It Is Hereby Stipulated And Agreed by and between the parties hereto, through their respective counsel, that the attached copy of the defendant, John Patrick Henry's Amendment to Motion to Suppress Evidence may be used in lieu of the original of said document, because, the original Amendment to Motion to Suppress Evidence, which was filed on November 27, 1957, has been mislaid.

/s/ R. Tieken
R. Tieken
United States Attorney
Attorney for Plaintiff

/s/ Edward J. Calihan, Jr.
Edward J. Calihan, Jr.
Attorney for Defendant,
John Patrick Henry

/s/ James P. Piragine
James P. Piragine
Attorney for Defendant,
Albert Rudolph Pierotti

Dated: April 18, 1958.

136 IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 57 CR 355) • •

AMENDMENT TO MOTION TO SUPPRESS EVIDENCE

Now comes John Patrick Henry, petitioner and co-defendant in the above-entitled matter, and states that on September 10, 1957 he filed his Motion to Suppress Evidence of the goods and merchandise, as alleged in the within indictment, and states as follows:

That on May 13, 1957 he was in possession of the within described goods and merchandise, as specified in the indictment, and that he had a proprietary interest in the said goods and merchandise.

/s/ John Patrick Henry
John Patrick Henry
Petitioner.

137 State of Illinois }
County of Cook } ss:

John Patrick Henry, being first duly sworn on oath, deposes and says that he is the petitioner named in the foregoing, by him subscribed, that he has read the same, knows the contents thereof, and that the matters and things contained therein are true.

/s/ John Patrick Henry

Subscribed and sworn to before me
this 27th day of November, 1957.
/s/ Ruth Quinlan
Notary Public

(Seal)

45 IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 57 CR 355) • •

TRANSCRIPT OF PROCEEDINGS
(Filed Mar 19 1958)

had in the above-entitled cause before the Honorable Philip L. Sullivan, Chief Judge of said court, in his courtroom in the United States Court House, at Chicago, Illinois, on November 25, 1957.

Hon. Robert Tieken,
United States Attorney,
By: Mr. Bernard J. Waters,
Assistant United States Attorney,
appeared on behalf of the Government.

Mr. Edward J. Calihan
and
Mr. James P. Piragine,
appeared on behalf of the defendants.

46 The Clerk: 57 CR 355. United States of America v. John Patrick Henry and Albert Rudolph Pierotti. Motion by defendant Pierotti for leave to file amendment to motion to suppress. Also up for trial.

Mr. Piragine: Good morning, your Honor. I am appearing on this matter and asking leave to file instanter amendment to the original motion to suppress as to the defendant Pierotti.

Mr. Waters: Your Honor has disposed of that motion adversely to the defendants. What they are filing now is an amendment to their original motion.

Mr. Calihan: Your Honor, I would like leave to file the same type of amendment by Wednesday, let us say.

The Court: I have forgotten.

Mr. Piragine: This was a case, your Honor, where we alleged that the arrest was illegal, where the FBI Agents had stopped the defendants. They were on an investigation for the hijacking of a load of liquor, and by chance they came upon three cartons of radios.

The Court: Well, what amendments have you?

47 Mr. Piragine: The reason I am filing this amendment, the Government raised some objection that in our original motion to suppress petition we did not allege a proprietory possessory interest. As far as I remember the record, the court did not rule on that particular objection the Government raised.

I would like to have, if it is agreeable to the court, although your Honor has ruled adversely on our motion, if your Honor sees fit, to have us file a brief.

The Court: No. I have that in mind and have your motion in mind and had at the time. You did not set up there your interest at all in filing the original motion.

Mr. Piragine: No, not in the original motion.

Mr. Calihan: Your Honor will recall that we argued the Chieppa case stated the occupants of an automobile have enough of a possessory interest; but it is our thinking, your Honor, in the event this should go forward from the trial level that we ought to amend our motion alleging a possessory interest.

The Court: Well, I think probably I will permit

48 that.

Mr. Waters: Your Honor will recall, in the course of the hearing, it was an extended hearing.

The Court: Yes, I remember it.

I will have to set this motion down.

Mr. Waters: Your Honor, perhaps counsel would have no objection if you would care to incorporate that in the trial of the case when we reach it and pass on it at that time.

Mr. Piragine: This is merely an amendment to the original—

Mr. Waters: These motions have been passed on by your Honor.

The Court: I think it has been passed on, and so I don't think there is any further hearing.

Mr. Calihan: If your Honor's ruling will be the same, we will then set it for trial.

The Court: When do you want to try it?

Mr. Piragine: According to my calendar, if agreeable with your Honor and the Government, I would like it after the first of the year.

Mr. Waters: That is agreeable with the Government, your Honor.

The Court: January 23.

50

TRANSCRIPT OF PROCEEDINGS
(Filed Mar 19 1958)

had in the above-entitled cause before the Honorable Philip L. Sullivan, Chief Judge of said court in his court room in the United States Court House at Chicago, Illinois, on Wednesday, January 22, 1958, at 10:00 o'clock a. m.

Appearances:

Hon. Robert Tieken, United States Attorney, (450 U. S. Court House, Chicago 4, Ill.), by Bernard J. Waters, Esq., Asst. United States District Attorney,
on behalf of the Government;

Edward J. Calihan, Jr., Esq.,
(105 West Adams Street, Chicago 3, Ill.),
on behalf of the Defendant
John Patrick Henry;

51 James P. Piragine, Esq.,
(209 South LaSalle Street, Chicago 4, Ill.),
on behalf of the Defendant
Albert Rudolph Pierotti.

(Mr. Calihan and Mr. Piragine were not present until January 23, 1958 at 10:00 a.m.)

52 And thereupon the following proceedings were had herein:—

The Court: Do you have something, Counsel?

Mr. Waters: Good morning, Judge. I just would like to ask whether or not I have a case up tomorrow, if I should bring some witnesses in on it. It is a case which I know will be very short because there is a charge of possession of goods which, in the course of interstate commerce, were stolen. The defendants, in a sworn statement—I mean, a stipulation has been entered into by both the defendants. The goods mentioned in the indictment were in the course of interstate commerce and were stolen while in the possession of the truck lines named in the indictment. They had a statutory value. The motion to suppress had been denied.

Actually, there isn't anything much more to it. We have pretty much established everything we have to. We will just put on a couple of witnesses to show that the goods were in the possession of the defendants, even though they admit it, and another witness—

The Court: If it is admitted, why do you have to prove it?

53 Mr. Waters: I understand they are going to appeal on the motion anyway. That is the only reason.

The Court: This was the case of—

Mr. Waters: Henry and Pierotti, your Honor. We had the motion to suppress before the Court.

The Court: Is this the case where they found an automobile?

Mr. Waters: That is correct.

The Court: The automobile was abandoned or stopped for some other reason?

Mr. Waters: That is right, Judge.

The Court: And I denied the motion.

Mr. Waters: You denied that motion.

The Court: I would think that everything is wound up in that motion.

Mr. Waters: I think it is too, Judge.

The Court: Where are your witnesses from?

Mr. Waters: All the witnesses which I would propose to present in that case are right here in Chicago. Some other witnesses have been subpoenaed, but, since those subpoenas went out, the stipulation has been entered into and, as a consequence, I wouldn't call them to testify.

The Court: Well, if you can dispose of it in a 54 short time, I will hear you.

Mr. Waters: Very well, your Honor. I will expect, then, to bring in probably two or three witnesses and they will be short witnesses.

The Court: Will they have any witnesses, do you know?

Mr. Waters: I don't think so, Judge. I am informed by counsel that their defense will be a nominal one.

The Court: Well, come in tomorrow morning and I will see if I can hear you.

Mr. Waters: Very well, your Honor. Thank you.

(Thereupon an adjournment was taken in the above-entitled cause to Thursday, January 23, 1958, at the hour of 10:00 o'clock a. m.,

55

• • (Caption—No. 57 CR 355) • •

Chicago, Illinois,
Thursday, January 23, 1958,
10:00 o'clock a. m.

Court resumed pursuant to adjournment.

Present:

Mr. Waters
Mr. Calihan
Mr. Piragine

And thereupon the following further proceedings were had herein:—

The Clerk: No. 57 CR 355, United States of America vs. John Patrick Henry and Albert Rudolph Pierotti, for trial.

Mr. Waters: Good morning; I believe we are ready.

Mr. Piragine: Ready on behalf of the defendant Pierotti.

Mr. Calihan: Ready on behalf of the defendant
56 Henry.

The Court: This is the case on which I heard the motion to suppress?

Mr. Waters: That is right. There has also been a stipulation entered into by the defendants as to the interstate shipment, the value of the articles and the fact they were stolen on the date alleged in the indictment and from the place alleged in the indictment, and the pleadings likewise are verified pleadings in which an affidavit incorporates a claim of possession by the defendants. I believe it would be a short case.

The Court: Has the jury been waived in the case?

Mr. Piragine: I don't believe we have signed a jury waiver.

Mr. Calihan: We will, if you wish, your Honor.

The Court: If it is going to be short, I will hear it.

Mr. Calihan: How many witnesses do you have?

Mr. Waters: I think three or four.

Mr. Calihan: Four witnesses?

Mr. Waters: Yes; not any more than that, none of which I expect to take any longer, except possibly the last one, than five or ten minutes each.

The Court: All right; I will see what we can do,
57 if it won't take very long.

(Thereupon the Court gave attention to other matters on his call, after which the following further proceedings were had herein:—)

The Clerk: No. 57 CR 355.

Mr. Piragine: At this time, your Honor, on behalf of the defendant Pierotti, I make a motion to exclude the witnesses.

The Court: All right. All witnesses please step forward and be sworn.

Mr. Waters: I will have them come in in a moment. and before they come I ask leave for the Court to designate Special Agent Stadtmiller to remain.

The Court: That is all right. Excuse me.

(Thereupon a short recess was taken.)

The Court: Proceed.

58 WILBUR HOLTZ, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Court: What is your name?

The Witness: Wilbur Holtz.

The Court: Where do you live?

The Witness: 4139 West 38th Place.

The Court: What do you do?

The Witness: Truck driver.

The Court: Proceed.

Direct Examination by Mr. Waters.

Q. Directing your attention, Mr. Holtz, to on or about the 13th day of May, 1957, where were you that day?

A. In Phil's Tavern.

Q. Did you see anyone there?

A. Yes.

Q. Did you see John Patrick Henry, the defendant in this case?

A. Yes, I did.

Q. Do you see him in the court room today?

59 A. Yes.

Q. Will you point him out, please?

A. There.

Mr. Waters: Indicating for the record that the witness has identified the defendant John Patrick Henry.

By Mr. Waters:

Q. Did you have a conversation with him at that time? Yes or no.

A. Yes.

Mr. Piragine: On behalf of the defendant Pierotti, I object to any conversation.

The Court: He wasn't there?

Mr. Waters: Pierotti was not.

The Court: That will apply to John Patrick Henry only.

By Mr. Waters:

Q. What did Henry say to you and what did you say to him?

A. I was talking about horses that morning, or we was, and I happened to like a special horse in the race and asked him if he knew where I could bet the horse, and he said, "Not right offhand," that he would

60 try to find out.

Q. What else did he say or did you say?

A. I asked him if it was very far, that he could use my car because it was such a bad day.

Q. Did you give him the keys to your car?

A. Yes, I did.

Q. Did he take your automobile?

A. As far as I know he did.

Q. Will you describe your automobile?

A. A 1953 Ford, Victoria.

Q. Will you describe what was in your automobile when he took it?

A. A spare tire.

Mr. Calihan: Objection to that unless there is some foundation that he knew the condition of the car, or unless—

The Court: I take it he saw this.

Mr. Waters: It is his automobile, your Honor.

The Court: And he saw what was in it, is that right?

Mr. Waters: He will testify, your Honor—

The Court: Go ahead.

61 By Mr. Waters:

Q. What was in your automobile?

A. A spare tire and some tools, seat cover, a little windshield washer kit and a couple of cans of polish.

Q. Were there any Admiral cartons in your automobile on that date?

A. No, there weren't.

Q. I show you Government's Exhibits 1, 2 and 3 for identification, and I ask you if you have ever seen those cartons before?

A. No, sir; I have not.

Mr. Waters: Thank you. Nothing further, your Honor.

The Court: Cross examine.

Cross Examination by Mr. Calihan.

Q. What time of the day or night was this on May 13th, 1957?

A. Around noon time, right after noon.

Q. 12:00 o'clock noon?

A. I wouldn't say it was right on the head. It was after that, I am pretty sure.

62 Q. How long had you been in the tavern?

A. Since about 7:30 in the morning.

Q. Had you been drinking?

A. I was, sir.

Mr. Calihan: I have no further questions.

The Court: Call the next; that is all.

Mr. Waters: Step down, please.

(Witness excused.)

WALLACE NUNES, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Court: What is your name?

A. Wallace Nunes.

The Court: And your address?

The Witness: 3234 South Wallace.

The Court: What do you do?

The Witness: Dock hand.

The Court: Pardon?

The Witness: Dock hand.

The Court: Where?

63 The Witness: Ziffrin Truck Lines.

The Court: How long have you been there?

The Witness: Three years this March the 7th.

The Court: Proceed.

Direct Examination by Mr. Waters.

Q. Do you know the defendant, Albert Pierotti?

A. I do.

Q. Do you see him in the court room today?

A. I do.

Q. Will you point him out, please?

A. There.

Mr. Waters: Indicating, for the record, may it please the Court, the witness has identified the defendant Albert Pierotti.

By Mr. Waters:

Q. Directing your attention to the 13th of May, 1957, were you employed by the Ziffrin Truck Lines?

A. I was.

Q. Will you state what you did on May the 13th, 1957?

64 A. I handled freight, unloaded interline freight.

Mr. Piragine: Speak a little louder, please.

By the Witness:

A. Unloaded interline freight.

By Mr. Waters:

Q. Who else was working with you that date, if anyone?

A. Myself, Al Pierotti and Joe T.

Q. Will you spell the name of Joe T. for the record, if you know?

A. I don't know the spelling of it.

Mr. Piragine: Pronounce it, please.

The Witness: T. The first name is Joe. The last name starts with a T.

By Mr. Waters:

Q. Pierotti was working with you also?

A. Yes.

Q. Will you tell us what, if anything, you did with respect to a Steffke load on that date?

The Court: What?

By Mr. Waters:

Q. A load that came in from Steffke Freight Lines with Admiral products.

65 A. A Steffke trailer backed to our dock in the morning, and it had an assignment of Admiral products bound for Cincinnati. We unloaded that for Steffke and put it on our outbound for Cincinnati.

Q. By "we" who do you mean?

A. Three men at that time; myself, Joe T. and Al Pierotti.

Q. What did you do?

A. Trucking.

Q. What did Joe T. do?

A. Joe T. was trucking and checking.

Q. What did Al Pierotti do, if anything?

A. Pierotti was stacking cartons.

Q. Where was he stacking the cartons?

A. He was stationed in the trailer.

Q. Was he alone in there?

A. He was alone.

Q. Were those cartons loaded on the Ziffrin trailer?

A. Yes.

Q. Were they counted on?

A. Yes.

Q. Was the count accurate?

66 A. Yes.

Q. I show you Government's Exhibits 1, 2 and 3, for identification, and I ask you if these cartons are similar to the cartons you loaded on May the 13th?

A. They are similar.

Mr. Waters: Nothing further.

Mr. Calihan: I object to all of his testimony as to the defendant Henry.

The Court: It will apply to the other defendant only.

Cross Examination by Mr. Piragine.

Q. Mr. Nunes, how many cartons were loaded, do you know, on that date, similar cartons to these that Mr. Waters has exhibited?

A. My actual count I wouldn't know, because I have no record of receiving the stated amount that came from that trailer.

Q. Did the three of you unload them from the Steffke trailer onto the Ziffrin trailer, did you say?

A. That is right.

67 Q. The three?

A. Two of us.

Q. Two?

A. Yes.

Q. Who were the two?

A. Joe T. and myself.

Q. You don't know what happened to all those cartons after they were loaded on the Ziffrin trailer, do you?

A. No, sir.

Q. I take it you went on to load or unload other merchandise at the dock?

A. That is right.

Q. You continued with your work?

A. That is right, sir.

Q. You don't know if that trailer in which you loaded these cartons which you testified to, similar to the three cartons Mr. Waters showed you, whether that trailer was locked or unlocked after you had concluded your part of your work on the loading of that trailer, do you?

A. That trailer was open.

Q. Was open?

A. Yes, sir.

68 Q. When did you leave, if you know—the time I am referring to—that particular Ziffrin trailer?

A. When did I leave?

Q. Yes; when did you conclude with your work with reference to—

A. Well—

Q. Just a minute, so you understand my question.

When did you leave the Ziffrin trailer in reference to these Admiral cartons, the time when you concluded?

A. At the conclusion of unloading the Steffke trailer we assumed our natural duties, that is myself, Joe T. and Al Pierotti. We resumed our duties of unloading and taking care of the interline freight.

Q. My question is, sir, when did you conclude?

The Court: When did you leave there that night or that day?

Mr. Piragine: No, Judge; I mean when did he finish.

The Court: What?

Mr. Piragine: When did he finish loading these cartons on the Ziffrin trailer.

69 The Court: All right.

By Mr. Piragine:

Q. What time was it? Do you understand my question?

A. I would say it took us approximately a half hour to unload the trailer.

The Court: What time did the trailer leave?

The Witness: Sometime close to noon time when the trailer was unloaded, sometime close to noon time.

By Mr. Piragine:

Q. You are talking about, I take it, the unloading, is that right? Do you know the time when these cartons were loaded on the Ziffrin trailer, Mr. Nunes?

A. All I know is they were loaded in the morning. What time I couldn't say.

Q. You do not know?

A. I don't know.

Mr. Piragine: That is all.

Mr. Waters: Briefly one question on redirect.

70 *Redirect Examination by Mr. Waters.*

Q. Did you have a conversation with Mr. Pierotti with respect to quitting time after this trailer was loaded?

A. I did.

Q. What did you say to him and what did he say to you?

Mr. Piragine: I object. It isn't proper redirect.

The Court: You may answer.

By the Witness:

A. Mr. Pierotti wanted to leave about 1:30, and I agreed to punch his time card out.

By Mr. Waters:

Q. Did he leave at 1:30?

A. I believe he did.

Q. Did you punch his time card?

A. I did.

Q. What time did you punch it?

A. 2:30.

Mr. Waters: Thank you. Nothing further, your Honor.

The Court: Anything further?

71 *Recross Examination by Mr. Piragine.*

Q. What time did the Ziffrin truck leave, do you know?

A. To the best of my knowledge it would be around noon time, probably a quarter of 12.00, twenty minutes of 12:00.

Q. That the Ziffrin trailer left?

A. That, I wouldn't know, sir, because my hours terminated at 2:30 in the afternoon. That trailer was still there at the dock to receive freight going to its destination. What time it left, I wouldn't know.

Q. Then you punched out Mr. Pierotti at 2:30, is that right?

A. That is right.

Q. And you saw him leave the dock?
A. I did, sir.
Q. Was he empty-handed?
A. Yes, sir.
Mr. Piragine: That is all.
Mr. Waters: Step down, please.

(Witness excused.)

72 JOSEPH TEODORCZYK, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Court: What is your name?
The Witness: Joseph Teodorczyk.
The Court: Where do you live?
The Witness: 5028 South Throop.
The Court: What do you do?
The Witness: I am a checker.
The Court: What?
The Witness: Checker for Ziffrin Truck Lines.
The Court: A checker?
The Witness: Yes, sir.
The Court: All right.

Direct Examination by Mr. Waters.

Q. Are you sometimes also known as Joe T.?
A. That is right.
Q. Were you so employed by Ziffrin Truck Lines on May the 13th, 1957?
A. Yes, sir.
73 Q. What were your duties on May the 13th, 1957?
A. Checker.
Q. Did you have occasion to be in the company of Al Pierotti—incidentally, do you know Albert Pierotti?
A. Sir?
Q. Do you know Albert Pierotti?

A. Yes, sir.

Q. Do you see him in the court room today?

A. Yes, sir.

Q. Will you point him out, please?

A. Right there.

Mr. Waters: Indicating, if it please the Court, the witness has identified the defendant Al Pierotti.

By Mr. Waters:

Q. In the company of Al Pierotti and Wallace Nunes did you have occasion to load Admiral products on a Ziffrin trailer?

A. Yes, sir.

Q. Was anybody else present?

A. Other dockmen were around.

Q. With respect to that physical loading?

A. Just three on that shipment.

74 Q. Will you tell us, please, what you did?

A. I received the shipment from Steffke.

Q. What, if anything, happened after that?

A. What do you mean?

Q. Did you then load it onto the Ziffrin trailer?

A. I loaded it on one of our trailers.

Q. Did you have occasion to make a count of the cartons coming off the Steffke trailer?

A. I counted them.

Q. Was that count accurate?

A. Yes, sir.

Q. Did you count them onto the Ziffrin trailer?

A. Yes, sir.

Q. Where, in the Ziffrin trailer, were they loaded, if you know?

A. Across the dock.

Q. In what part of the trailer were they loaded?

A. Right in the front.

Q. Commonly called the nose of the trailer, the part nearest the tractor?

A. No, sir; there was no tractor around there.

Q. I say that is the very front of the trailer?

A. Yes, sir.

Q. Who stacked them?

75 A. Al Pierotti.

Q. Was he alone in there when he was stacking them?

A. Yes, sir.

Q. What did you do with respect to the movement of those cartons into the trailer?

A. I would wheel them from the Steffke truck across the dock to the trailer, and I was stacking first.

Q. Were they counted accurately on the Ziffrin trailer?

A. Yes, sir.

Q. Did all of this happen in Chicago in the Northern District of Illinois?

A. Yes, sir.

Mr. Waters: Thank you.

Mr. Calihan: I object to his testimony as to the defendant Henry, your Honor.

The Court: It would apply only to the one present.

Cross Examination by Mr. Piragine.

Q. Mr. Witness, you received this shipment, you

76 say, from the Steffke trailer?

A. Yes, sir.

Q. Where was that trailer in reference to the Ziffrin trailer, approximately?

A. Across the dock about forty or fifty feet.

Q. About forty or fifty feet?

A. Yes.

Q. Did I understand you to testify you wheeled them from the Steffke trailer to the Ziffrin trailer, is that correct?

A. Yes, sir.

Q. And do you know how many cartons there were?

A. Offhand I don't remember that shipment.

Q. You don't remember?

A. No.

Q. All right. You say that the defendant Pierotti had stacked them in the Ziffrin trailer, is that correct?

A. Yes, sir.

Q. Was there any other merchandise, if you know?

A. There was other freight.

Q. Just a moment, please.

Was there any other merchandise placed in the Ziffrin trailer after Pierotti had stacked these Admiral car-
77 tons, as you have testified?

A. Yes, sir, there was other freight went in.

Q. Other freight?

A. Yes, sir.

Q. Do you recall what type of freight?

A. Well, no, I don't recall.

Q. Do you recall what dock handlers put this other freight in the Ziffrin trailer?

A. No, sir; I don't know. See, there are three checkers. There were two or three checkers.

Q. Who were the other individuals working there at that time?

A. Howard Lutz.

Q. Yes, sir—

A. He could have stacked freight behind there, too.

Q. All right. Who else, sir?

A. Me.

Q. Yourself?

A. Yes.

Q. Who else?

A. Almost anybody that works on the dock there.

Q. How many employees are there? You are a checker, are you?

78 A. Yes, sir.

Q. How many employees were there at that time?

A. There was about twelve of us, I think.

Q. And they are all freight handlers, so to speak; is that what they are called?

A. Yes, sir.

Q. They load and unload trucks, is that correct?

A. Yes, sir.

Q. And there were about twelve?

A. About twelve.

Q. About twelve at that time, is that correct?

A. Yes, sir.

Q. How long is the dock at Ziffrin?

A. I don't know—a couple of hundred feet.

Q. Approximately how many trailers can back up to the dock?

A. Twelve on each side.

Q. Are the truck drivers, that is, the drivers who back up the Ziffrin trailers and tractors, are they around the docks?

A. They walk around the dock, yes.

Q. They walk around the dock?

A. Yes, sir.

Q. Are there other truck drivers, other than Zif-
79 frin employees, who deliver freight such as the Steffke Truck Lines?

A. Yes, sir.

Q. Are they around there waiting for their trailer to be loaded or unloaded?

A. Yes, sir; they are hanging around there.

Q. How many truck drivers, in addition to the twelve dock handlers, were there on May the 13th, 1957, in the morning up to noon, to the best of your recollection, Mr. Teodorczyk?

A. They keep coming in and out. Sometimes there are four or five of them at a time in there.

Q. Were there six or ten?

Mr. Waters: Pardon me. Your Honor, this is considerably beyond the scope of the direct examination.

The Court: He may answer.

By Mr. Piragine:

Q. Would you answer that?

A. What is that?

Q. Would you say there were at least six truck drivers?

A. Yes, sir, I would say that.

Q. Or more?

80 A. Maybe more.

Q. Did you see them walking on the dock?

A. Yes, sir.

Q. Where the cartons of Admiral radios were unloaded and loaded in the Ziffrin trailer?

A. No, sir; they were on the other side, on the receiving end.

Q. Do you know, Mr. Witness, how many other Ziffrin employees placed other freight, that is, loaded into the Ziffrin trailer after Mr. Pierotti had packed up, I believe you said, the Admiral cartons?

A. There was about four of us after that that kept loading it up with more freight.

Q. About four others besides yourself, Mr. Pierotti and Howard Lutz, is that correct?

A. Yes, sir.

Q. That would be a total of at least seven people who entered the Ziffrin trailer?

A. Yes, sir.

Q. At one time or another?

A. Yes, sir.

Q. After the Admiral cartons had been loaded?

A. Yes, sir.

81 Q. By Pierotti?

A. Yes, sir.

Q. Did you see Mr. Pierotti leave that particular date?

A. No, sir.

Mr. Piragine: That is all.

Mr. Waters: Nothing further, your Honor.

(Witness excused.)

JOHN J. OITSZINGER, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Court: What is your name?

The Witness: John J. Oitszinger.

The Court: Where do you live?

The Witness: 18 Bigelow Road, Park Forest, Illinois.

The Court: What do you do?

The Witness: Special agent in the Federal Bureau of Investigation.

The Court: All right.

82 *Direct Examination by Mr. Waters.*

Q. Were you so employed on May the 13th, 1957?

A. Yes.

Q. What were your official duties on that date? To what squad were you assigned?

A. We were assigned to investigate a theft from an interstate shipment. It was a loss at Hayes Freight Lines, a truckload of whiskey.

Q. Mr. Oitszinger, on May the 13th, in the afternoon hours did you have occasion to position yourself at the mouth of an alley on the south side of Chicago?

A. Yes.

Q. Would you tell us where that alley was?

A. That alley was between Lowe Street and Union, and the alley ran from 26th to 28th.

Q. While you were at that alley, was anybody else with you?

A. Yes.

Q. Who was there?

A. Agent Stadtmiller.

Q. What, if anything, did you see then?

A. I saw a 1953 Ford automobile which was driven
83 by Mr. Pierotti accompanied by Mr. Henry.

Q. Do you see those gentlemen in the court room today?

A. Yes.

Q. Will you point them out, please?

A. Mr. Pierotti is behind Mr. Piragine, and Mr. Henry is sitting alongside Mr. Calihan.

Mr. Waters: Indicating, for the record, if it please the Court, the witness has identified the defendants.

By Mr. Waters:

Q. Did what you are testifying to happen in Chicago in the Northern District of Illinois?

A. Yes.

Q. Will you tell us what, if anything, they did at that time and place?

A. Mr. Henry got out of the passenger's side of the automobile, walked around the front of the automobile and entered a gangway to the west. Several minutes later he came out carrying some cartons. He got back into the automobile, and they drove off.

Q. At that time did you have occasion to take a photograph of the incidents you have described?

84 A. No.

Q. What, if anything, happened after that?

A. We got back into our Bureau automobile and proceeded west on 28th Street and north on Union, east on 26th Street, and we couldn't see their car, so we cruised around, and several minutes later we were going down

South Wallace, and as we were approaching 29th Street we could see their automobile parked in the position we had seen it previously.

Q. Near what building was it parked?

A. It was parked across the street from the Red Top Lounge.

Q. It that a tavern?

A. That is a tavern.

Q. Did you have occasion to follow that automobile back to where you saw it in the alley again?

A. Yes.

Q. Will you describe what happened at that time?

A. We followed—before following the automobile, we watched the automobile, and several minutes later three men came out of this tavern, Steve Bedalow, Mr.
85 Pierotti and Mr. Henry. Steve Bedalow continued to walk north on Wallace Street. Mr. Pierotti and Mr. Henry got back into the automobile. Mr. Pierotti was behind the wheel. They drove south to 30th Street, then west to Lowe Street, north on Lowe Street to 28th, 28th Street west to the alley between Lowe Street and Union Street and back to the same position where we had seen them previously.

Q. What, if anything, happened there?

A. Mr. Henry got out of the automobile and again walked around the front of the automobile into this gangway. Several minutes later he returned carrying several cartons.

Q. What, if anything, did you do at that time?

A. I took photographs.

Q. I show you Government's Exhibit No. 4 for identification, and I ask you if that truly and accurately portrays what you have described?

A. Yes.

Q. And what you photographed?

A. Yes.

Q. What, if anything, happened after that?

A. They proceeded north to 26th Street. We got back into the Bureau automobile and went east to
86 Lowe Street and north on Lowe Street, and we saw them coming south on Lowe Street, and we met them toward the end of the street, which would be approximately the 2700 block.

Q. And your car and their automobile came to a stop at that time?

A. Yes.

Q. Did you have a conversation with Pierotti or Henry at that time?

A. Yes.

Q. Was there anybody else present?

A. Yes.

Q. Who else was present?

A. Agent Stadtmiller.

Q. What, if anything, was said at that time and place?

A. I was driving. I got out of the driver's side. Mr. Henry got out of the passenger's side immediately, and Mr. Pierotti got out of the driver's side.

Q. When Mr. Henry got out of the passenger's side, did he close the automobile door after him, or did he leave it open?

A. No, it was wide open.

87 Q. What, if anything, happened then?

A. I heard him say to Mr. Pierotti, "Tell them you just picked me up."

Q. What, if anything, further was said by anybody?

A. We exchanged the usual greetings.

Q. You were acquainted, were you not?

A. Yes.

Q. Proceed.

A. I walked over to the automobile, and I could see three Admiral cartons. One of the cartons had the flaps

open. I could see a shipping label there indicating it was going to Cincinnati, Ohio.

Q. Did you at that time do something with respect to those cartons?

A. Yes.

Q. What did you do?

A. Photographed them.

Mr. Piragine: What was that?

By the Witness:

A. Photographed them.

By Mr. Waters:

Q. I show you Government's Exhibit No. 5 for 88 identification, and I ask you if that truly and accurately reflects the interior of the automobile in which Pierotti and Henry were riding and which you photographed on May the 13th?

A. Yes.

Q. What, if anything, happened after that?

A. We entered into a conversation. I asked them how about these cartons.

Q. By them, who do you mean?

A. Mr. Henry and Mr. Pierotti.

Q. Will you relate, please, what you said and what they said, if anything?

Mr. Piragine: Your Honor, could we possibly have the time and place?

Mr. Waters: May the 13th, and will you fix the time?

Mr. Piragine: I don't mean the date. I mean the hour of the day.

By Mr. Waters:

Q. Will you fix the hour, Mr. Oitszinger?

A. At this point it was approximately 2:35 p.m.

Q. Will you tell us, please, what was said then?

A. We asked them, "How about these cartons; whose cartons are they?" They said they didn't know.

Q. By "they," you have to tell us who talked.

89 A. Mr. Henry and Mr. Pierotti. I asked them, "Whose automobile is this?"

Mr. Henry says, "I don't know; it is not mine."

Mr. Pierotti said, "It belongs to another fellow."

I said, "Who is the other fellow?"

He said, "A fellow by the name of Babe," and I said, "What is his last name?"

He said he didn't know.

Q. This is Mr. Pierotti talking?

A. That is right.

I said, "Where does this fellow live?"

He said he doesn't know.

I said, "Where did you meet him?"

He said, "Phil's Tavern at 26th and Halsted." He said the keys were in the ignition and that he had used the car on other occasions.

He gave us a description of this other fellow Babe.

Q. Pierotti gave the description?

A. Yes. He said he was of either Irish extraction or Polish extraction.

Q. What, if anything, further did he say at that

90 time?

A. I asked him whether he had been in the alley, indicating the alley back in the 2600 block between Lowe and Union, and he said no.

Mr. Piragine: Excuse me. You are referring to which defendant now?

The Witness: Mr. Pierotti.

Mr. Piragine: Thank you.

By the Witness:

A. (Continuing) And he said he had just got off work, and I asked Mr. Henry if he was in that alley.

By Mr. Waters:

Q. Pardon me. Did Mr. Pierotti say what time he quit work on that date?

A. No; he said he just got off work.

Q. What, if anything, further was said?

A. Then I asked Mr. Henry if he was back in that alley, and he said no, indicating to Pierotti, "He just picked me up."

Q. What, if anything, further was said?

A. I asked Mr. Pierotti if he had just been over to the Red Top Lounge, and he said no, and I asked Mr. Henry if he had just been over to the Red Top
91 Lounge, and he said no. However, that he might have been there in the morning.

Q. Was there anything further said?

A. In asking them whose cartons they were, Mr. Pierotti said he did know they were in the car when he got in the car. Likewise, Mr. Henry said they were in the car when he got in the car.

Mr. Waters: Thank you; nothing further.

Cross Examination by Mr. Calihan.

Q. Mr. Oitszinger, that morning of May the 13th you have stated that you were in that area investigating a loss of the Hayes Freight Lines, a load of whiskey, is that correct?

A. Yes.

Q. Do you know how many other Bureau cars were in that area that morning?

Mr. Waters: I object, your Honor. It is immaterial to this inquiry.

The Court: He may answer.

By the Witness:

A. I don't believe there were any in the immediate area.

92 By Mr. Calihan:

Q. How many cars were assigned to the search for leads on the Hayes whiskey loss?

A. I would be guessing at the number. I would say maybe four or five autos.

Q. Four or five cars with two agents in each car?

A. One or two.

Q. How far away were you from the 1953 Ford when you first saw it in the alley?

A. I was at the mouth of the alley, approximately three hundred feet away.

Q. What were the size of the cartons they were carrying?

A. It was hard to tell what the size of the cartons were from that distance.

Q. Well, could you say anything about those cartons?

Mr. Waters: I object, your Honor. He has answered he was unable to tell about the size or the character of the cartons.

The Court: He may answer if he knows.

93 By the Witness:

A. All that I can say is that they were cartons.

By Mr. Calihan:

Q. Were they the size carton as identified here previously as Government's Exhibits 1, 2 and 3?

A. That is difficult to state, especially if he is carrying several cartons.

Q. Well, you couldn't see any lettering or anything like that on the cartons, could you?

A. No.

Q. You don't know whether they were groceries or not, do you, in a box?

A. No.

Q. There isn't anything suspicious about a person carrying a carton, is there?

A. Under what circumstances?

Q. Under any circumstances.

A. Some circumstances.

Q. To carry a carton?

A. It all depends upon who is carrying the carton and under what circumstances.

Mr. Waters: Your Honor, I will ask leave to explore this avenue on redirect if counsel pursues it further.

94 The Court: Beg your pardon?

Mr. Waters: I will ask leave to explore this avenue on redirect if counsel pursues it further.

By Mr. Calihan:

Q. I am asking about carrying cartons. You don't know anything about those cartons?

A. I don't know what the contents were.

The Court: You don't know the contents?

The Witness: No.

The Court: All right.

By Mr. Calihan:

Q. You stated that they drove off and you lost them for the time being, and the next time you saw them the car was parked in front of the Red Top Lounge?

A. That is right.

Q. Did you get out and examine the car at that time?

A. No.

Q. You just drove by?

A. No; we didn't drive by.

Q. You parked some distance away?

A. In the rear.

95 Q. When they came out, you saw Steve Bedalow, or what did you call him—

A. That is his name.

Q. Do you know whether he was stopped that morning?

A. Not in the morning; I don't know about the morning.

Q. Well, was he stopped that afternoon?

Mr. Waters: I object, your Honor.

The Court: Sustained.

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UNITED STATES DISTRICT COURT
for the
Northern District of Illinois—Eastern Division

United States of America
v.
Albert Rudolph Pierotti
No. 57 CR 355

In this 24th day of January, 1958 came the attorney for the government and the defendant appeared in person and[1] by his counsel and the trial of the cause proceeds and the Court now having heard all the evidence adduced for the parties and arguments of counsel and being fully advised finds the defendant guilty as charged in the Indictment and

It Is Adjudged that the defendant has been convicted upon his plea of[2] not guilty and a finding of guilty of the offense of Section 659, Title 18, United States Code (Theft from interstate shipment) as charged[3] and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] One (1) Year and One (1) Day

It Is Further Ordered that execution of sentence be and the same is hereby stayed until January 27, 1958 and that bond of the defendant heretofore filed herein shall remain in full force and effect.

It Is Further Ordered that appeal bond be and the same is hereby fixed at the sum of Two Thousand Five Hundred ($2,500.00) Dollars.

By Mr. Calihan:

Q. Do you know whether he was stopped or not of your own knowledge.

A. Yes.

Q. Will you answer the question?

A. After talking to Mr. Pierotti and Mr. Henry, another Bureau car accompanied us on the scene, and we turned Mr. Pierotti and Mr. Henry over to the occupant of that car, and about that time, Mr. Bedalow was driving along in what I think was about a 1946 Ford sedan. I stopped Mr. Bedalow. I know Mr. Bedalow. He knows me.

Q. Did you see him handle any of these cartons?

A. No.

96 Q. You just stopped him?

A. Yes.

Q. Because he was seen talking to these two in front of the Red Top Lounge?

A. Yes.

Q. What time was it, incidentally—and I don't believe I covered this—that you first saw the 1953 car in the alley?

A. Approximately 2:10 p.m.

Q. 2:10?

A. Yes.

Q. The next thing that occurred, you stated that the 1953 Ford went back to the same point in the same alley?

A. That is right.

Q. This is where you took the picture?

A. That is right.

Q. And were you the same distance away at that time?

A. Yes.

Q. About 300 feet?

A. Yes.

It Is Adjudged that[5]

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Philip L. Sullivan,
United States District Judge.

The Court recommends commitment to:[6]

....,
Clerk.

January 24, 1958.

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number " if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5] Enter any order with respect to suspension and probation. [6] For use of Court wishing to recommend a particular institution.

Q. Or is it 300 yards?

A. 300 feet.

97 Q. Did you again notice Mr. Henry with cartons?

A. Yes.

Q. Would your answers be the same with reference to those cartons as they were on my previous question?

A. Yes.

Q. You couldn't identify them in any way, shape or form?

A. No.

Q. And then after that is when you made the stop on the street, a head-on stop? You were driving in the opposite direction, and you drove directly in front of them and stopped, is that correct?

A. Yes.

Q. You got out of one side and Stadtmiller got out of the other, and Henry and Pierotti got out of their vehicle?

A. Yes.

Q. Did you subsequently obtain a search warrant for the premises in that alley, the premises immediately adjacent to the gangway which you saw Mr. Henry enter?

A. No.

98 Mr. Waters: Objection, your Honor. It is immaterial.

The Court: The answer may stand. Go ahead.

By Mr. Calihan:

Q. Did anyone else?

A. Not to my knowledge.

Q. Were the premises searched?

A. Not to my knowledge.

Q. Did you go to the police department and ask them to make a search of those premises?

A. No.

Q. Did anyone else, of your knowledge, with the Bureau?

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IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 57 CR 355) • •

NOTICE OF APPEAL
(Filed Jan 31 1958)

Names and addresses of appellants:

John Patrick Henry
2604 South Wallace
Chicago, Illinois

Albert Rudolph Pierotti
8628 South Emerald
Chicago, Illinois

Names and addresses of appellants' attorneys:

Edward J. Calihan, Jr.
Attorney for John Patrick Henry
2211 Bankers Building
105 West Adams Street
Chicago 3, Illinois

James P. Piragine
Attorney for Albert Rudolph Pierotti
Suite 1045
209 South La Salle Street
Chicago 4, Illinois

Offense: Violation of Section 659, Title 18, United States Code. Possession of goods stolen from an interstate shipment.

Concise statement of judgment or order, giving date, and any sentence:

On January 24, 1958 the Court found both defendants guilty, as charged in the indictment, and sentenced them to one year and one day.

128 Name of institution where now confined, if not on bail:

Each defendant is enlarged on $2,500.00 appeal

A. Not to my knowledge.

Q. Do you know who lived on those premises?

A. Yes, I believe I did.

Q. What was his name?

A. A Mr. and Mrs. Francis Burke.

Q. You don't know whether or not that was ever searched, whether those premises were ever searched?

A. Not to my knowledge.

Q. You say you stopped the car then at 2:30 in the afternoon, 2:35, and you had a conversation with Henry and Pierotti on the street?

99 A. Yes.

Q. Where did you go after you stopped them on the street?

A. After our conversation we arranged for their automobile to be pulled over to the curb, and I left them with another agent, as I previously explained, of the FBI, and I joined Mr. Stadtmiller at 2625 South Union where the Burkes live.

Q. What did you do there?

A. Mr. Stadtmiller was in a conversation with Mrs. Burke.

Q. Did she permit the search of the premises?

A. No.

Q. What did you do after you left the Burkes, if anything?

A. We returned to the Bureau car and picked up Mr. Pierotti and Mr. Henry and proceeded to our office.

Q. By the office, you mean the FBI headquarters over here?

A. 212 West Monroe.

Q. Did you make an investigation as to the contents of those cartons which you say you removed from the automobile?

100 A. I didn't.

bond, set by the United States District Court for the Northern District of Illinois, Eastern Division.

We, the above-named appellants, hereby severally appeal to the United States Court of Appeal for the Seventh Circuit from the foregoing judgment.

John and Patrick Henry and
A. R. Pierotti
/s/ Edward J. Calihan Jr.

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United States of America } ss.
Northern District of Illinois }

• • (Caption—No. 57 CR 355) • •

CERTIFICATE OF MAILING

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on January 31, 1958 in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, and Criminal Procedure a copy of the foregoing Notice of Appeal was mailed to:

Honorable R. Tieken, United States Attorney
450 United States Court House
Chicago 4, Illinois

Honorable Kenneth J. Carrick, Clerk
United States Court of Appeals, Seventh Circuit
1212 Lake Shore Drive
Chicago 10, Illinois

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 31st day of January, 1958.

Roy H. Johnson
Clerk

By /s/ Gizella Butcher
Deputy Clerk

(Seal)

Q. Did you cause one to be made?

A. Mr. Stadtmiller did.

Q. In the interests of expediency, is it not a fact that your first thought was that these may have been taken from the Indianapolis Forwarding Company; and I believe Mr. Stadtmiller so testified?

A. I knew they were from an interstate shipment. I didn't know who the common carrier was.

Q. How long was it after you took these people down there, the defendants down there, that you determined that there had been a loss?

A. I would be guessing at the time because Mr. Stadtmiller handled that phase of it.

Q. Your best guess, sir, four or five hours?

A. I would say approximately 4:30.

Q. 4:30 that afternoon?

A. Yes.

Q. You had determined there had been a loss?

A. Yes.

Q. And it was at that time that you placed them under arrest?

A. Formally, yes.

101 Q. And informally you placed them under arrest when you stopped the vehicle, did you not?

Mr. Waters: I object to this, your Honor.

The Court: Sustained.

By Mr. Calihan:

Q. As far as you know, you had no warrant for the arrest of either Mr. Henry or Pierotti, did you?

A. No.

Q. So far as you know, they were in violation of no law at the time you observed them?

Mr. Waters: I object to that, your Honor.

The Court: Sustained. Anything further?

Mr. Calihan: I am finished.

139 United States of America)
Northern District of Illinois) ss.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that the annexed and foregoing are the original papers constituting the record on appeal in the cause entitled: United States of America, Plaintiff vs. John Patrick Henry and Albert Rudolph Pierotti, Defendant, No. 57 CR 355, as follows:

Indictment filed May 21, 1957

Order entered June 13, 1957 arraignment and plea

Petitioner, Albert R. Pierotti's motion to suppress evidence filed June 28, 1957

Petitioner, John Patrick Henry's motion to suppress evidence filed September 10, 1957

Government's Answer to defendant's motion to suppress evidence filed September 9, 1957

Clerk's file copy of transcript of proceedings had before the Honorable Philip L. Sullivan, Judge, on October 22, 1957 filed by the official court reporter on March 19, 1958

Petitioner Albert R. Pierotti's amendment to motion suppress evidence filed November 25, 1957

Clerk's file copy of transcript of proceedings had before the Honorable Philip L. Sullivan, Judge on November 25, 1957, filed by the official court reporter on March 19, 1958

Clerk's file copy of transcript of proceedings had before the Honorable Philip L. Sullivan, Judge on January 22, 1958, filed by the official court reporter on March 19, 1958

140 Judgement and Commitment entered January 24, 1958 re each defendant

Cross Examination by Mr. Piragine.

Q. Mr. Oitszinger, I didn't quite get the location where you said you were at this particular alley. To just clarify it for myself, I didn't. I know you stated it, but I didn't hear it.

102 A. He can read that back, can't he?

Q. That would be quite some distance when you said you observed this Ford.

A. In the alley?

Q. Yes.

A. Yes.

Q. Where was that?

A. That was an alley between Lowe Street and Union Street from 26th to 28th.

Q. Between 26th—

A. And 28th. 27th Street doesn't cut through there.

Q. That, then, is an alley of approximately two city blocks what you are referring to, is that correct, 26th to 28th?

A. Very short city blocks.

Q. It is still a city block, is it not?

A. Yes.

Q. And you were facing what direction, sir, when you observed this 1935 Ford?

A. North.

Q. You were facing north.

A. Yes.

Q. And I understand that this vehicle was about

103 300 miles—I am sorry—300 feet from your point of observation, is that correct?

A. Yes.

Q. And at that time, Mr. Oitszinger, you didn't recognize who was driving that particular 1953 Ford, did you?

A. I saw Mr. Pierotti driving the automobile when it entered the alley.

Defendants-Appellants' Notice of Appeal filed January 31, 1958

Clerk's certificate of mailing attached thereto

Stipulation filed March 7, 1958

Order entered March 7, 1958 extending the time in which to file and docket record on appeal to April 22, 1958

Statement pursuant to Rule 12(d) filed February 5, 1958

Stipulation pursuant to Rule 12(e) of the Rules of the United States Court of Appeals, for the Seventh Circuit, filed April 10, 1958

Stipulation with copy of John Patrick Henry's amend ment to motion to suppress evidence filed April 18, 1958

Order entered April 18, 1958, granting leave to restore lost original of Henry's Amendment to motion to suppress evidence by filing a copy thereof

filed and entered among the records of the said Court in my office on the dates indicated.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 18th day of April, 1958.

Roy H. Johnson
Clerk

By /s/ Gizella Butcher
Deputy Clerk

(Seal)

Q. Just a minute—

The Court: At that time.

The Witness: No.

By Mr. Piragine:

Q. At that time you didn't know who was in the car, is that right, if there was anybody?

A. I know who was in the car.

Q. Can you truthfully say, sitting on the witness stand, that from 300 feet at your point of observation you can tell the Court who was in that car, if there was anybody?

A. I can say this—

Q. I mean at that time, Mr. Witness.

Mr. Waters: Let him answer.

The Court: You can answer it. At that time did you know?

104 The Witness: No.

The Court: All right.

By Mr. Piragine:

Q. Where was this Red Top Lounge or tavern located?

A. I believe it is at 2903 South Wallace.

Q. 2903?

A. Yes.

Q. Did you go into this tavern after you had observed both the defendants Pierotti and Henry?

A. No.

Q. You did not?

A. I did not.

Q. Do you know of your own knowledge whether or not any other agents from your Bureau entered the Red Top Lounge?

A. I believe some of the agents from our office did.

Q. That is referring to May the 13th, 1957?

A. Yes.

Q. Who were they?

The Court: If you know of your own knowledge.

The Witness: Agent Huber might have gone in
105 there.

By Mr. Piragine:

Q. Who else?

A. I don't know.

Q. You know that other agents of your own knowledge did go in the tavern?

A. Yes.

Q. Do you know of your own knowledge whether or not they executed a search of the Red Top Lounge Tavern?

Mr. Waters: I object, your Honor. This is pretty far beyond the scope of the direct examination.

The Court: Sustained.

By Mr. Piragine:

Q. Did you observe the condition of Bedalow on that date, as to sobriety, on which you testified on direct examination?

A. Yes.

Q. What was it?

A. I considered him as being sober.

Q. Did you see this individual who was referred to, as you have testified, by defendant Pierotti as Babe on May 13th, the owner of the automobile?

106 A. I might have seen him later in our office. I am not sure.

Q. Did you investigate the fact whether or not this car was owned by Babe as the defendant Pierotti had indicated to you?

A. I didn't.

Q. You did not?

A. No.

Q. You did search the car when you stopped both defendants, that is, the 1953 Ford, did you not, Mr. Oitszinger?

A. I didn't.
Q. You did not?
A. No, I didn't.
Q. Didn't—
Mr. Waters: I object, your Honor. He has answered the question he did not search the car.
The Court: Yes, sustained.
Mr. Piragine: Maybe his interpretation of search—
The Court: You may ask him another question.
Mr. Piragine: That is what I intend to do.
107 By Mr. Piragine:
Q. Did you handle these cartons which you have identified?
A. I believe Agent Stadtmiller did.
Q. You were there?
A. Yes.
Q. You didn't touch them?
A. I didn't.
Q. Did you see Agent Stadtmiller take them out of the 1953 Ford?
Q. If you know, did Agent Stadtmiller place either of the defendants under arrest prior to that, prior to his taking the three cartons out of the 1953 Ford?
Mr. Waters: I object, your Honor, He has answered these defendants were placed under arrest at about 5:00 o'clock that evening.
The Court: He may answer.
By Mr. Piragine:
Q. Would you answer that, Mr. Witness?
A. They were formally placed—
108 Q. No; please. My question was at the time immediately prior to—you just testified Agent Stadtmiller took these three cartons out of the 1953 Ford, is that correct?
The Court: He has gone over that.

Mr. Piragine: I am just going to refresh him, Judge, as to what I am asking.

By Mr. Piragine:

Q. My question is this: Immediately prior to Agent Stadtmiller taking the three cartons out of the car, did he place the defendant Pierotti or the defendant Henry under arrest, if you know?

Mr. Waters: I object, your Honor.

The Court: He may answer that, if he knows. What is the answer?

The Witness: I am thinking. I know this much; I told them that "there is something wrong here, this isn't right." I said, "Let's go down to our office."

By Mr. Piragine:

Q. I didn't ask you that, sir.

The Court: Did you place them under arrest?

109 The Witness: No.

The Court: Did you see anyone else do it?

The Witness: No.

The Court: All right.

Mr. Piragine: That answers it.

The Court: Is that all?

Mr. Piragine: That is all, if the Court please.

Mr. Waters: A couple of questions, your Honor.

The Court: Make it very brief, because I have taken longer now than I thought. I was under the impression it was only going to take a few minutes.

Redirect Examination by Mr. Waters.

Q. I show you Government's Exhibits 1, 2 and 3 for identification, and ask you if these are the cartons removed from the automobile on May the 13th, 1957?

A. Yes.

Q. Are they in the same condition now as they

110 were when they were removed from the automobile?

A. Yes.

Q. Including Government's Exhibit No. 2 for identification, being opened?

A. Yes.

Q. They have been in the Bureau's care, custody and control ever since?

A. Yes.

The Court: Is that all?

Mr. Waters: I offer in evidence, your Honor, at this time Government's Exhibits 1, 2, 3, 4 and 5 for identification.

The Court: Any further examination? Any objection?

Mr. Piragine: I would like to ask one question.

The Court: All right.

Recross Examination by Mr. Piragine.

Q. Is it a fact that you opened this flap on one—which is this now?

111 Mr. Waters: Government's Exhibit 2, I believe.

By Mr. Piragine:

Q. This Exhibit No. 2, that you ripped open this flap?

A. No.

The Court: Is that all?

Mr. Piragine: That is all.

The Court: Is there any objection to the introduction of the exhibit? They may be received.

(Said Government's Exhibits 1, 2, 3, 4 and 5 were thereupon received in evidence.)

(Witness excused.)

The Court: Is that all?

Mr. Calihan: We stipulated, your Honor, they were interstate.

Mr. Waters: The Government has no further witnesses.

The Court: You mean you rest?

Mr. Waters: I will rest, your Honor.

I will read into the record, if it please the Court, the stipulation entered into, together with the pleadings of
112 the case heretofore filed by the defendants.

The Court: How many witnesses do you have for the defense?

Mr. Piragine: Your Honor, we rest at this time.

The Court: You rest?

Mr. Piragine: Yes.

Mr. Calihan: Yes.

The Court: Come in tomorrow morning, and I will see if I can hear you about 10:30.

Mr. Waters: Do you want me to read the stipulation then, your Honor?

The Court: I have a grand jury coming now. It will go over anyway, whether stipulations are read in or not, until 10:30 tomorrow morning.

(Thereupon an adjournment was taken to Friday, January 24, 1958, at 10:30 o'clock a. m.)

113

* * (Caption—57 CR 355) * *

Chicago, Illinois,
Friday, January 24, 1958,
10:30 o'clock a. m.

Court resumed pursuant to adjournment.

Present:

Mr. Waters
Mr. Calihan
Mr. Piragine

And thereupon the following further proceedings were had herein:—

The Clerk: The case on trial.

The Court: We will recess for a few moments.

(Thereupon a short recess was taken.)

The Court: You may proceed.

Mr. Piragine: If the Court please, Mr. Waters informed me that the Government has rested, is that correct?

114 Mr. Waters: Yes.

The Court: Both sides rested.

Mr. Piragine: If it please your Honor, Mr. Waters, on behalf of the defendant Pierotti I am making a motion for judgment of acquittal on the basis that the record, as it now stands, is lacking one iota of evidence that the Government has proven beyond a reasonable doubt the essential element which is the crux of the crime as alleged in the one count of this indictment, and mainly the element of knowledge.

115 (Thereupon Mr. Piragine addressed the Court in argument on behalf of Defendant Pierotti, reported but not transcribed at this time.)

116 (Thereupon Mr. Calihan addressed the Court in argument on behalf of Defendant Henry, reported but not transcribed at this time.)

117 Mr. Calihan: (Continuing) And I respectfully move the Court enter a motion for judgment of acquittal as to the defendant Henry.

118 (Thereupon Mr. Waters addressed the Court on behalf of the Government, reported but not transcribed at this time.)

125

UNITED STATES DISTRICT COURT
for the
Northern District of Illinois—Eastern Division

United States of America
v. No. 57 CR 355
John Patrick Henry

In this 24th day of January, 1958 came the attorney for the government and the defendant appeared in person and[1] by his counsel and the trial of the cause proceeds and the Court now having heard all the evidence adduced for the parties and arguments of counsel and being fully advised finds the defendant guilty as charged in the Indictment and

It Is Adjudged that the defendant has been convicted upon his plea of[2] not guilty and a finding of guilty of the offense of Section 659, Title 18, United States Code (Theft from interstate shipment) as charged[3] and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] One (1) Year and One (1) Day

It Is Further Ordered that execution of sentence be and the same is hereby stayed until January 27, 1958 and that bond of the defendant heretofore filed herein shall remain in full force and effect.

It Is Further Ordered that appeal bond be and the same is hereby fixed at the sum of Two Thousand Five Hundred ($2,500.00) Dollars.

It Is Adjudged that[5]

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Philip L. Sullivan,
United States District Judge.

The Court recommends commitment to:[6]

....., Clerk.

January 24, 1958

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number " if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5] Enter any order with respect to suspension and probation. [6] For use of Court wishing to recommend a particular institution.

[fol. 80]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12306

September Term and Session, 1958

THE UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

JOHN PATRICK HENRY and ALBERT RUDOLPH PIEROTTI, Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Before Duffy, Chief Judge, Hastings and Parkinson, Circuit Judges.

OPINION October 2, 1958

Hastings, Circuit Judge. Appellants, John Patrick Henry and Albert Rudolph Pierotti, were convicted under a one-count indictment charging them with the unlawful possession, in violation of Title 18 U.S.C.A. § 659, of three cartons of radios stolen from an interstate shipment. This appeal is based on alleged errors of the trial court in overruling the motions of both appellants to suppress evidence used in this cause and in its denial of appellant Henry's motion for a judgment of acquittal.

It is appellants' contention that the pre-trial hearing on their motions to suppress established that they were the victims of an unlawful arrest and search without warrant by agents of the Federal Bureau of Investigation and that, consequently, the evidence uncovered in the search, the three cartons of radios, should properly have been suppressed.

[fol. 81] George Stadtmiller, one of the two Federal agents who arrested appellants, was the only witness called by appellants in support of their motions to suppress and was, indeed, the sole witness in the pre-trial hearing on the motions. From his testimony are found the following facts: Agent Stadtmiller and Agent John J. Ortzinger who accompanied him were, on the day of the arrest, May 14, 1957, investigating leads to a reported theft of whiskey from the Hayes Freight Lines located in Chicago, Illinois, which had occurred the night before. Stadtmiller indicated that he was acquainted with both appellants, although he was not asked to explain in what connection he knew them) and also testified that he had received information concerning the "*implication*" of defendant Pierotti with interstate shipments," this information purportedly coming from a Mr. Lieberman, vice president of the Ziffrin Truck Lines and employer of Pierotti. There is no indication in the record in what manner Pierotti was so implicated.

Appellants were first observed by the agents, on the day of the arrest, emerging from the Red Top Lounge located at 2003 South Wallace Street, Chicago, Illinois, at about 2:10 p.m. They then walked to a 1953 two door black and white Ford parked across the street and, with Pierotti driving, were observed to travel by a rather indirect route to an alley between Union and Lowe streets. The agents, who had followed, parked their car, walked to the end of the alley and observed Henry leave the car occupied by appellants and enter a gangway. Henry returned in about two minutes carrying some cartons which he placed in the car. Appellants drove off and were lost to the view of the agents. The agents then returned to their car and drove through various streets looking for appellants' car which they finally located parked in its original position opposite the Red Top Lounge on Wallace Street. The agents parked nearby and shortly thereafter observed Henry and Pierotti leave the Lounge. After engaging in conversation with a man known to the agents as Steve Bedlow, appellants returned to their car and drove back to the same alley where Henry was again observed getting out of the car, entering the gangway and returning shortly carrying some more cartons which he again placed in the car. The agents saw

all this at a distance of some 300 feet and could not have [fol. 82] known at that time the contents of the cartons, their number or size. Appellants then drove away, followed by the agents, and a few minutes later at about 2:50 p.m. were intercepted by the agents who motioned them to stop as the two cars approached each other traveling along Wallace Street. Henry got out of the car leaving the car door open and approached the agents. He was overheard to say to Pierotti: "Hold it. It's the G's," and "Tell him he [you?] just picked me up." The three cartons bearing shipping labels which indicated they were part of an interstate shipment *were plainly visible to Agent Stadtmiller through the open door of the car.*

Stadtmiller testified further that:

> " . . . We asked them about the ownership of the car, and Mr. Pierotti said it wasn't his car, and he said it was Babe's car, and that he had borrowed it. And we asked him about the cartons that were in the car, and he said that they were in the car when he—
>
> "The Court: Just a minute. All right, go ahead.
>
> "By the Witness:
>
> "A. (Continuing) We asked him about the cartons that were in the car, and he said that they were in the car at the time he borrowed it from the owner.
>
> . . .
>
> "Q. What, if anything, else was said by you to the defendants and by the defendants to you at that time and place?
>
> "A. Well, after they said, after Mr. Pierotti said the cartons were in the car at the time he borrowed it, we asked them if they had just been at the Red Top Lounge, and Mr. Henry said that he may have been earlier that day as he was visiting numerous taverns. Mr. Pierotti said he had just got off work at 2:30.
>
> "Q. Do you know of your own knowledge, whether or not that was correct?
>
> "A. Well, I had seen him at 2:10 away from work."

Appellants were then taken into custody. It was ultimately determined, between 4:30 and 5:00 p.m. of that day, that the cartons in question had been stolen from a motor truck of the Ziffrin Truck Lines, and appellants were then *officially informed* that they were under arrest and of the charges against them.

[fol. 83] Appellants raise the contention that the stopping of their car and resulting discovery of the cartons of radios plainly visible through the open door of the car was an unlawful search. Under the Fourth Amendment to the Constitution a lawful search of a car moving on a public thoroughfare may be had without a warrant providing probable cause for the search exists. *Brinegar* v. *United States*, 338 U.S. 160 (1949); *Carroll* v. *United States*, 267 U.S. 132 (1925).

The Supreme Court of the United States in the *Carroll* case observed that:

> "On reason and authority the true rule is that 'if the search and seizure without a warrant are made upon probable cause, that is, upon a belief reasonably arising out of circumstances known to the seizing officer that an automobile or other vehicle contains that which by law is subject to seizure and destruction the search and seizure is valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when adopted, and in a manner which will conserve public interests as well as the rights of individual citizens.
>
> * * *
>
> "'The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books or papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In one case the Government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods

is authorized by the common law . . . ." *Carroll* v. *United States*, *supra* at 149-150.

In the *Brinegar* case the Supreme Court stated that probable cause "has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense is being committed." *Brinegar* v. *United States*, *supra* at 175-176.

[fol. 84] This court has defined probable cause as "reasonable grounds of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged. . . . [A]nd what constitutes probable cause must be determined from the standpoint of the officer with his skill and knowledge, rather than from the standpoint of the average citizen under similar circumstances." *United States* v. *Sebo*, 7 Cir., 101 F. 2d 889, 890 (1939). The agent need not have legal evidence of a suspected illegal act. *Brinegar* v. *United States*, *supra* at 174-175; *Gilliam* v. *United States*, 6 Cir., 189 F. 2d 321, 323 (1951). It is only necessary that the facts and attendant circumstances are such as would lead a reasonably prudent man to believe that articles are illegally possessed in the automobile to be searched. *Husty* v. *United States*, 282 U.S. 694, 701 (1931).

We hold that there existed probable cause for the search in this case. The agents, while investigating for leads to a reported theft of whiskey which had occurred the previous night, observed appellants' unusual behavior set forth above. Both appellants were known to the agents, and appellant Pierotti known by them to be involved or implicated in interstate shipments in some manner. As in the *Brinegar* and *Carroll* cases, no problem of search of a home or other place of privacy is involved. These cases involve the freedom to use public thoroughfares in swiftly moving vehicles for dealing in contraband. Not every traveler may be stopped and searched at an officer's whim or mere sus-

picion, but it is clear that here the facts within the agents' knowledge amounted to more than mere suspicion and constituted probable cause for their action in stopping appellants' car.

The arrest and taking into custody of appellants followed the discovery of the cartons of radios bearing the shipping labels indicating that they were part of an interstate shipment and the far from satisfactory explanation by appellants in regard to the ownership of the cartons. Agents of the Federal Bureau of Investigation are empowered by statute to "make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have *reasonable grounds to be-* [fol. 85] *lieve that the person to be arrested has committed or is committing such felony.*" (Our emphasis.) 18 U.S.C.A. § 3052. The agents on finding the cartons of radios in the car had reasonable ground to believe that the felony of illegal possession of goods stolen from an interstate shipment was then being committed and the arrest was therefore valid. See *Bell* v. *United States*, D.C. Cir., 254 F. 2d 82 (1958); *Walker* v. *United States*, 7 Cir., 246 F. 2d 518 (1957); and *Gilliam* v. *United States*, 6 Cir., 189 F. 2d 321 (1951). The fact that there had been no reported theft of radios from an interstate shipment cannot be seriously considered as an indication that the agents acted without "reasonable grounds." An arresting officer deals in probabilities, not certainties and not necessarily eventual truth. *Brinegar* v. *United States*, *supra* at 176; *Bell* v. *United States*, *supra* at 86. The trial court properly denied appellants' motion to suppress.

Appellant Henry contends further that, as a matter of law, the evidence was not of sufficient weight to support a conviction as to him and that, therefore, the trial court erred in denying his motion for judgment of acquittal. In considering appellant's contention in this regard this court may not weigh the evidence nor determine the guilt or innocence of the accused and must view the record in the light most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *Green* v. *United States*,

7 Cir., 246 F. 2d 155, 157 (1957); *United States* v. *Iacullo*, 7 Cir., 226 F. 2d 788, 795 (1955). If, as appellant Henry contends, the government's case had been based solely on the fact of his presence in the car which contained the stolen goods and his association with the other defendant, the government would have failed to prove unlawful and knowing possession on his part: *United States* v. *O'Brien*, 7 Cir., 174 F. 2d 341, 344 (1949). However, in this case the record shows further that the car in which appellants were driving had been borrowed by Henry from one Wilbur Holtz who denied the presence of the cartons in his car at the time Henry took the vehicle. At the time they were stopped and questioned Pierotti untruthfully asserted that the car had been loaned to him. Agent Oitszinger testified of his observations of appellants' conduct set forth elsewhere in this opinion which shows clearly that Henry exer- [fol. 86] cised dominion over the cartons completely inconsistent with the attempted explanation at the time of his arrest that the cartons were in the car when he got into it and that he did not know whom they belonged to. This court held in *Wilkerson* v. *United States*, 7 Cir., 41 F. 2d 654, 657 (1930) that:

> "Possession of the fruits of crime recently after its commission justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence."

We hold that the evidence supports the conviction of Henry and that the trial court did not err in denying his motion for judgment of acquittal.

The judgment of the district court is

Affirmed.

PARKINSON, Circuit Judge, dissenting.

In order to sustain the judgment of conviction in this case the Government is obliged to justify the search as being incident to a lawful arrest. This it cannot do and I am, therefore, compelled to dissent.

On the day of the arrest federal agents were investigating leads to a whiskey loss from the Hayes Freight Lines which had occurred the night before. Agents Stadtmiller and Oitszinger were in a car so engaged. The defendants "were driving south in the 2600 block on Wallace, and we (the agents) were headed north, and we (the agents) intercepted their path." The agents "drove directly in front of" the car in which the defendants were riding and made "a head-on stop".

Counsel for the Government stated in oral argument before this court that when the federal agents stopped the defendants' car the arrest of the defendants occurred right then and there. Thus it is clear that unless the agents had probable cause to *then* believe that the defendants had committed a felony cognizable under the laws of the United States that arrest was not a valid one and any search incident thereto was unlawful. The search at its commencement must be valid and cannot be saved by [fol. 87] what it turns up. "In law it is good or bad when it starts and does not change character from its success." *U.S. v. Di Re*, 1948, 332 U.S. 581, 595.

The parties are in agreement that probable cause means more than bare suspicion. The Government's contention that there was probable cause to arrest the defendants when the federal agents stopped defendants' car is based solely upon three factors: 1. the defendants were seen carrying cartons, the number, size and contents of which were completely unknown to the agents, which the defendants placed in the back of their automobile; 2. the agents were "acquainted" with the defendants; and 3. a Mr. Lieberman, vice-president of Ziffrin Truck Lines, for which the defendant Pierotti worked, had told Agent Stadtmiller that Pierotti had been "implicated" with interstate shipments.

Again in oral argument before this court the Government admitted that it could not explain what had been meant by the words "acquainted" and "implicated". It has not been argued, nor from this record could it be so argued, that any connotation unfavorable to defendants must or should be placed upon these words. They stand alone unexplained and undefined and as such they are meaningless. They cannot be twisted and contorted into personal knowledge by the agents that the defendants were criminals or were known to be involved in federal law violations as were the defendants in the *Carroll* and *Brinegar* cases.

Not only were the agents unable to tell anything about the cartons prior to the arrest but on subsequent examination it was shown that whereas the agents were looking for and expected to find stolen whiskey, the cartons contained no such thing. Moreover, after the agents had opened the cartons and examined the contents they were unable to say what crime, if in fact any at all, had been committed.

In the *Walker* case the evidence clearly showed that the arresting federal agents had personal knowledge given to them by an informer which furnished probable cause to believe a federal felony was being committed. Thus this court held the arrest was valid and the search incidental thereto lawful. Likewise in the *Gilliam* case the federal
[fol. 88] agents had personal knowledge that the defendant was a bootlegger and they had been furnished with information by an officer that clearly constituted probable cause. It is that sort of direct evidence of personal knowledge that is completely lacking in the case at bar.

The *Bell* case has no application here. There the arresting officers were policemen of the District of Columbia. They stopped the defendant's car after he had pulled away from the curb and had driven some two blocks without lights at 3:30 o'clock in the morning. The officers could have properly arrested the defendant for driving without lights.

Apart from the fact that the record in the *Carroll*, *Husty* and *Brinegar* cases clearly disclosed evidence of personal

knowledge of the arresting federal agents that each defendant was a bootlegger and engaged in illegal trafficking of liquor in violation of The National Prohibition Act and thereby had probable cause sufficient to search their respective automobiles. Mr. Justice Jackson speaking for the court in *U. S. v. Di Re*, 1948, 332 U.S. 581, points up the clear distinction between such cases and the one here when he speaks on page 584 as follows:

> "The belief that an automobile is more vulnerable to search without warrant than is other property has its source in the decision of *Carroll v. United States*, 267 U.S. 132. That search was made and its validity was upheld under the search and seizure provisions enacted for enforcement of the National Prohibition Act and of that Act alone."

Again we say there is no evidence of personal knowledge by the federal agents here that the defendants or either of them could have been suspected of interstate shipment thefts at the time the path of their car was intercepted by the agents and they were arrested and taken into custody. It was at that time probable cause had to exist for when their car was stopped by the agents intercepting its path and driving directly in front of them and making a head-on stop I think the arresting officers were then in the position of an officer who has entered a home; *i.e.*, the search at that time had to be valid and could not be saved by what it later uncovered.

[fol. 89] In my opinion the search of defendants' automobile was in clear violation of the Fourth Amendment. I would, therefore, reverse and remand with instructions to sustain the motions to suppress.

[fol. 90]

In United States Court of Appeals

For the Seventh Circuit

Chicago 10, Illinois

No. 12306

United States of America, Plaintiff-Appellee,

vs.

John Patrick Henry & Albert Rudolph Pierotti,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

Judgment—October 2, 1958

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed.

[fol. 91]

IN UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—November 4, 1958

It is ordered by this Court that the petition for rehearing filed in the above cause be, and the same is hereby, Denied.

[fol. 92] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 93]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—February 24, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

after his arrest, and his fleeting twenty minute association with the other defendant, should it not be determined, as a matter of law, that there was insufficient evidence to authorize a conviction in a case where the defendant offered no evidence, but relied upon a motion for judgment of acquittal at the close of the government's case?

7. Where the facts in evidence explain the proximity of stolen goods found in an automobile in which the petitioner is a passenger, does the presumption or inference, that the unexplained "possession" of recently stolen property will authorize conviction, apply?

STATEMENT OF THE CASE.

A one-count indictment, 57 CR 355, was returned against the defendants, JOHN PATRICK HENRY and ALBERT RUDOLPH PEROTTI, on May 21, 1957, charging them with the unlawful possession of three (3) cartons of radios of a value in excess of $100.00, which had theretofore been stolen from an interstate shipment, in violation of Section 659, Title 18, United States Code. The defendants each moved to suppress the evidence in this cause and after hearing by the Court, said motions were respectively denied on October 22, 1957. Subsequently, the motions to suppress were amended, and were again denied on November 25, 1957.

Defendants waived a jury and trial commenced on January 23, 1958; it was concluded on the same day. Both defendants moved for acquittal at the close of the government's evidence, and offered no evidence in their own behalf.

The defendants were convicted in the Court below, and were each sentenced to terms of one year and one day in the custody of the Attorney General.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted] 17

JOHN PATRICK HENRY,
Petitioner.

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

EDWARD J. CALIHAN, JR.,
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Chicago 3, Illinois,
Attorney for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No.

JOHN PATRICK HENRY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioner, JOHN PATRICK HENRY, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on January 24, 1958, and is not reported, but appears in the printed Appendix filed with, and certified by, the Clerk of the United States Court of Appeals as a part of the record, and transmitted herewith.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed October 2, 1958, and is not yet reported, but is set forth in the Appendix hereto, and in the certified copy of the record.

JURISDICTION.

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on October 2, 1958. On November 4, 1958, it was ordered that the petition for rehearing be denied. (These orders appear in the appendix hereto.) This petition is filed within thirty days of the denial of the petition for rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Was it not error for the Court of Appeals to sustain the ruling of the District Court, denying the defendant's motion to suppress the evidence, which was secured by agents of the Federal Bureau of Investigation, in violation of the defendant's rights under the Fourth Amendment to the Constitution of the United States?

2. Does the Fourth Amendment to the Constitution of the United States permit the stopping of an individual riding in a motor vehicle on the public highway, detention and questioning of said individual, search of the vehicle in which he is riding as a passenger, physical deprivation of his freedom of movement, without such conduct constituting an arrest? Is the arrest delayed or inchoate until the federal officers choose to inform him that he has been "formally" arrested some three hours after the original

detention, where the original stopping of the vehicle and detention of the person was without probable cause for an arrest or search?

(a) Will facts developed by the officers during the detention, and from it, justify this procedure?

3. Where armed agents of the Federal Bureau of Investigation have no warrant of arrest or search warrant, does their act of stopping an automobile, occupied by the driver and the petitioner, a passenger, traveling on a public thoroughfare in Chicago, Illinois, constitute an arrest, where the occupants of said automobile remained in continuous custody of the Federal Bureau of Investigation until their arraignment before the United States Commissioner on the following day?

4. Does such an arrest occur at the moment when the automobile is stopped by the compulsion of the government agents, or was the arrest delayed until following the stopping, when the questions asked of the occupants were not satisfactorily answered?

5. Where the United States Court of Appeals has distorted, by its interpretation of *Brinegar* v. *United States*, 338 U.S. 160 and *Carroll* v. *United States*, 267 U.S. 132, the meaning of these cases in order to sustain a search without warrant, and where no facts exist constituting probable cause to make an arrest, or to obtain a search warrant, should not this Court exercise its jurisdiction, on the principle that a search in law is good or bad when it starts, and does not change character from its success?

6. Where it appears from the evidence that the defendant, John Patrick Henry, was convicted solely on the government's evidence of his presence as a passenger in an automobile which contained stolen goods discovered

The Court set appeal bonds in the amount of $2,500.00.

The errors relied upon relate to the denial of the motions to suppress, and the sufficiency and, as to the defendant Henry, the weight of the evidence.

The United States Court of Appeals for the Seventh Circuit affirmed the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, and denied the defendant's (JOHN PATRICK HENRY's) petition for rehearing. (The defendant ALBERT RUDOLPH PIEROTTI is not a party to this appeal.)

STATEMENT OF FACTS.

On May 13, 1957 the defendants JOHN PATRICK HENRY and ALBERT RUDOLPH PIEROTTI were arrested by George Stadtmiller and John Oitzinger, agents of the Federal Bureau of Investigation. The agents were in the vicinity of 26th Street and Wallace Avenue, looking for leads to a "whiskey loss" of the Hayes Freight Line at 26th and Canal (App. 15-51). There was testimony that there were three or four FBI units in the area on the same assignment (App. 15-58). The agents first observed the defendants in a 1953 Ford automobile, driven by Mr. Pierotti (App. 12). The defendants were in an alley between Lowe St. and Union Avenue, and the alley ran from 26th to 28th Streets. The defendant Henry got out of the passenger side of the automobile, entered a gangway, and several minutes later, he returned to the automobile, carrying some cartons (App. 19). The agents were approximately 300 feet from the defendants. The defendants drove off in the automobile, and the agents lost track of them.

Several minutes later, the agents saw the automobile parked in the vicinity of the intersection of Wallace Avenue and 29th Street. The agents observed the two defend-

ants leave the Red Top Lounge, reenter the automobile and return to the alley, where they had first observed them. Again, the defendant Henry left the automobile, went into a gangway, and returned carrying several cartons. The defendants again drove off. The agents, upon this occasion, were approximately 300 feet away (App. 20). When questioned as to the size of the cartons, or any identification or markings, Agent Oitzinger stated he could not even tell the size from that distance, and was unable to identify them as being the cartons identified as government's exhibits 1, 2 and 3, containing the radios, which were alleged to have been stolen. Agent Oitzinger further testified that he could not even tell whether the defendant Henry was carrying groceries in the cartons (App. 58). Stadtmiller could not tell whether they were full or empty, nor could he read any description (App. 25).

After the defendants drove away, the agents again temporarily lost sight of them, and shortly thereafter observed the defendants in the 1953 Ford, driving south in the 2600 block of Wallace Avenue. The FBI agents were proceeding north on the same street. The agents thereupon drove directly, in a head-on manner, at the defendants in their 1953 Ford, and Agent Stadtmiller motioned for the defendants to stop with his hand out of the FBI automobile window. Both cars stopped, and the agents motioned the defendants out of the automobile (App. 21).

A search of the vehicle was thereupon made, and the cartons containing the radios, the subject matter of the indictment herein, were discovered. Even then, they were not sure of an offense (App. 68). The agents established that the defendants' possession of the vehicle was lawful. In the trunk of the vehicle was a carton of cleaning ma-

terial, which was subsequently shown not to have been stolen. The agents then took the defendants to the Chicago office of the FBI and, after several hours, determined that the radios had been taken from a motor truck of the Ziffrin Truck Lines. It was also established that the agents had called other truck lines to determine whether any truck line had suffered a radio loss (App. 16-17).

Thereafter, the defendants were *formally* placed under arrest — some time after 5 P. M. — or approximately three hours after they were first arrested on the street (App. 25, 63). The foregoing evidence was presented on the motion to suppress in which the defendants contended that there was no probable cause to make the arrest without warrant and incidental search. The trial court denied the motion.

At the trial of the case, the evidence adduced by the government may be summarized as follows:

A stipulation was entered into between the government and the defendants as to the interstate shipment; the value of the articles; that the articles were stolen on the date alleged in the indictment and from the place alleged in the indictment. The government also referred to the pleadings in which the defendants, by their motion to suppress, allege occupancy of the vehicle in which the articles were found, and by the amendment to the motion to suppress allege possession of the said articles (App. 35).

The following is a summary of the testimony of the witnesses:

Wilbur Holtz:

This witness stated that he saw JOHN PATRICK HENRY in Phil's Tavern at about 12 o'clock noon on May 13, 1957. The witness had been drinking since 7:30 in the morning, and asked the defendant Henry whether the defendant

knew where the witness could bet on a horse. Henry said he wasn't sure, but might be able to find out, and asked permission to use the witness' 1953 Ford, in which both defendants were later apprehended. The witness gave Henry the keys and Henry took the vehicle. This witness denied the presence of any cartons of radios in his vehicle (App. 36-39).

Wallace Nunes:

This witness said he was a dock hand at Ziffrin Truck Lines, and on May 13, 1957 was working with the defendant, ALBERT RUDOLPH PIEROTTI, who was also employed at said truck line. In addition to the defendant Pierotti, the witness said one Joe Teodorczyk was working with them, unloading cartons of radios. The trailer was completely loaded and checked by noon. The defendant Pierotti asked Nunes to punch his time card out at 2:30, even though Pierotti left the premises about 1:30. When Pierotti left the dock at 1:30, he was empty-handed (App. 39-45).

Joe Teodorczyk:

This witness testified that he was employed by the Ziffrin Truck Lines on May 13, 1957, and was working with Albert Rudolph Pierotti and Wallace Nunes in the loading of some cartons of radios on a Ziffrin trailer. This witness testified that he counted the cartons coming off of a Steffke trailer, from which the shipment was received, and on to the Ziffrin trailer across the dock. He stated that he counted them coming off of the Steffke trailer and all of them were placed on the Ziffrin trailer.

On cross examination, he stated that at least seven (7) persons had access to the Ziffrin trailer; which was loaded with additional material subsequent to the radio cartons being loaded (App. 45-51).

John Oitzinger:

This witness was an agent of the Federal Bureau of Investigation, who testified that he was assigned with Agent Stadtmiller to investigate the theft of whiskey from an interstate shipment of the Hayes Freight Line. He testified to the observation of the defendants, HENRY and PIEROTTI, as hereinbefore set forth. Apparently, Oitzinger conducted the questioning after the men were stopped, and Oitzinger determined at that time the ownership of the vehicle (App. 51-56).

Oitzinger admitted that at least four or five cars, with one or two agents, were in the vicinity, looking for leads to the Hayes whiskey loss (App. 57). When he first saw the defendants, he could not tell what size carton Henry was carrying (App. 58).

After Henry and Pierotti were arrested, Oitzinger also stopped one Bedalow, who was driving a 1946 Ford sedan. Oitzinger said that this man was stopped merely because he was seen talking to Henry and Pierotti in front of the Red Top Lounge (App. 60).

Oitzinger said that he had no warrant for the arrest of either Henry or Pierotti (App. 63).

Upon cross-examination, when asked whether the defendants were in violation of any law, so far as the agents knew, at the time the agents observed the defendants, the question was objected to and sustained by the Court (App. 63).

This witness also testified that a search of the vehicle in which the defendants were riding was made by Agent Stadtmiller (App. 67). After Agent Stadtmiller took the three cartons out of the defendants' automobile, the witness said:

"There is something wrong here, this isn't right. Let's go down to our office." (App. 68).

The government thereupon rested, after introducing the cartons of radios (App. 69).

The defendants offered no evidence, and moved for a judgment of acquittal. After argument, said motion was denied.

REASONS FOR GRANTING THE WRIT.

This Court should exercise its jurisdiction in this case for the following reasons:

I) There is involved herein an important question of federal law which has not been, but should be settled by this Court.

II) If *United States* v. *Di Re*, 332 U.S. 581, 595, may be decisive, then the decision of the Court of Appeals below is in conflict with such decision of this Court.

III) The decision of the Court of Appeals below is in conflict with the leading State of Illinois case on the subject which, because it involves arrest without warrant, is dependent for validity on state law. *United States* v. *Di Re*, 332 U.S. 581; *Johnson* v. *United States*, 333 U.S. 10.

IV) The Court of Appeals below has so far sanctioned a departure from the accepted and usual course of judicial proceedings by a lower Court as to call for an exercise of this Court's supervision, by affirming a conviction for a knowing and wilful violation of the law, in a case where there was no proof of such knowing and wilful violation established before the District Court nor the Court of Appeals, both Courts having relied upon an improper interpretation of a so-called presumption, to the effect that unexplained possession of recently stolen goods will authorize a conviction.

I.

The important question of federal law which should be settled by this Court is: Does the act of stopping an automobile, traveling on a public highway, then and there constitute an arrest? The significance of the moment of arrest is bottomed on the principles of the Fourth Amendment to the Constitution of the United States, which define the rights of people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. This search and seizure was claimed to be incidental to arrest, and the principal questions here presented are: 1) At what point did the arrest occur? and 2) Was the evidence discovered after the arrest? The time of arrest and therefore the validity of the evidence secured thereby is crucial because the motion to suppress such evidence, upon which the conviction is based, was denied below.

The evidence demonstrates that the agents of the Federal Bureau of Investigation drove headlong at the defendants' automobile, each car then traveling in an opposite direction, and motioned the petitioner and the driver of the automobile to stop and get out of the car. The petitioner stated, "Hold it! It's the G." (App. 23).

If the arrest occurred at that point, as the petitioner contends, then the subsequent finding of the radios, which were the subject of the indictment herein, could not make good the original arrest. The agents, in calling upon the defendants to stop their vehicle, did so by virtue of their official position. The evidence is such that the agents testified that the defendants knew they were federal officers (App. 54). The compulsion exercised by these officers then and there, in depriving the defendants of their freedom of proceeding along a public highway, constituted an arrest. These agents were armed men, ordering the de-

fendants to stop, and they blocked the way of the defendants with their car. The petitioner contends that the restraint of his freedom of locomotion, thus inducing a reasonable apprehension that force would be used, unless there were submission, constitutes an arrest. It is enough to constitute an arrest, if the conduct of the officers operates on the will of the persons threatened, and results in a reasonable fear of personal difficulty or personal injury.

Therefore, if, as the petitioner contends, the arrest took place at the point of stopping, any subsequent look into the automobile, or questioning of the occupants, even if only a short time later, was an incident to the arrest. If probable cause did not exist prior to the finding of the cartons of radios, the subsequent finding cannot save the arrest.

The only case the petitioner has been able to find which in any way approaches the problem is *United States* v. *Hanley*, 50 F. 2d 465, (D.C.N.Y.), where the Court stated:

> "I find that they, without probable cause, stopped the automobile, ordered its driver to pull up to the curb, and then boarded it. If thereafter the driver told them the truck contained beer, he did so under coercion, and after the search and seizure had commenced."

The motion to suppress was granted in the foregoing case.

The basic question here, as to when an arrest occurs, has never been specifically decided by this Court, to the best of the petitioner's knowledge. It is respectfully urged that such a question—particularly, where the means and speed of locomotion have advanced so rapidly since the turn of the century—is vital for the guidance of law enforcement agencies and the protection of rights of citizens under the Fourth Amendment to the Constitution of the United States.

II.

This Court has stated, in *United States* v. *Di Re*, (1948) 332 U.S. 581, 595:

> "In law, it is good or bad when it starts, and does not change character from its success."

In connection with the problem here, the majority opinion of the Court of Appeals below stated in its opinion: (App. 5a-6a)

> "* * * the facts within the agents' knowledge amounted to more than mere suspicion and constituted probable cause for their action in stopping appellants' car.
>
> "The arrest and taking into custody of appellants followed the discovery of the cartons of radios bearing the shipping labels indicating that they were part of an interstate shipment and the far from satisfactory explanation by appellants in regard to the ownership of the cartons. * * * The agents on finding the cartons of radios in the car had reasonable ground to believe that the felony of illegal possession of goods stolen from an interstate shipment was then being committed and the arrest was therefore valid. * * *"

On the other hand, the dissenting opinion (App. 9a-10a) states:

> "Again we say there is no evidence of personal knowledge by the federal agents here that the defendants or either of them could have been suspected of interstate shipment thefts at the time the path of their car was intercepted by the agents and they were arrested and taken into custody. It was at that time probable cause had to exist for when their car was stopped by the agents intercepting its path and driving directly in front of them and making a head-on stop I think the arresting officers were then in the position of an officer who has entered a home; *i.e.*, the search at that time had to be valid and could not be saved by what it later uncovered.

> "In my opinion the search of defendants' automobile was in clear violation of the Fourth Amendment. I would, therefore, reverse and remand with instructions to sustain the motions to suppress."

Parenthetically, it should be noted at this point that the dissenting opinion makes the following observation pertinent to part I of this portion of the petition: (App. 7a)

> "Counsel for the Government stated in oral argument before this court that when the federal agents stopped the defendants' car the arrest of the defendants occurred right then and there. Thus it is clear that unless the agents had probable cause to *then* believe that the defendants had committed a felony cognizable under the laws of the United States that arrest was not a valid one and any search incident thereto was unlawful. The search at its commencement must be valid and cannot be saved by what it turns up. 'In law it is good or bad when it starts and does not change character from its success.' *U. S. v. Di Re*, 1948, 332 U.S. 581, 595."

It is therefore our position that the point of arrest is vital. The Court of Appeals below, in its majority opinion, has indicated one standard for stopping the automobile, and another standard for making the arrest. In other words, it appears that the agents may have had a suspicion that something was amiss, and thus, this suspicion could justify the stopping of the motor vehicle. Inherent in their opinion is the recognition that, by no stretch of the imagination, could the reasonably prudent agents have concluded that a federal offense was being committed. The Court of Appeals below, therefore, attempts to say in one paragraph of its opinion that the agents had probable cause to stop the vehicle. In the next paragraph, having stopped the vehicle, and having found that answers to their questions were not satisfactory, and having examined cer-

tain cartons, and having made a three-hour investigation as to the nature of the packages, which ultimately resulted in evidence that the packages had recently been stolen, the Court of Appeals has concluded that the agents had probable cause to make such an arrest. The opinion indicates that the initial arrest was made *after* the discovery of the cartons, and *after* the far from satisfactory explanation, and that the *formal arrest* occurred some three hours later in the offices of the Federal Bureau of Investigation. It is interesting to note that, even after the finding of the cartons of the radios in the automobile, Agent Oitzinger said (App. 68):

> "* * * I told them that 'there is something wrong here, this isn't right.' I said, 'Let's go down to our office.'"

It is the petitioner's further assertion that this Court, in *Giordenello v. United States*, 78 S. Ct. 1245, has recently reaffirmed the holding of *United States v. Di Re*, 332 U.S. 581 and *United States v. Rabinowitz*, 339 U.S. 56. For the Court of Appeals below to contend that the arrest can follow the actual restraint of the individual, who has been continuously in the custody of the Federal Bureau of Investigation from the point of the stopping of the automobile to the arraignment before the United States Commissioner on the following day, is in direct conflict with the above-cited cases.

III.

The petitioner has quoted hereinabove portions of the majority opinion of the Court of Appeals below. It is next contended that said opinion is in conflict with the leading case in the State of Illinois on the subject of when an arrest occurs. This case is *People v. Mirbelli*, 236 Ill. App. 533. It is respectfully submitted that, on the point

involved herein, this is recognized and followed as authority in Illinois. The case holds:

> "In the instant case the People contend that 'defendant was not arrested until after officers viewed the concealed weapon on his person.' On the other hand, defendant strenuously contends that he was arrested when the officers, with drawn weapons, 'hollered' to him to 'stick them up, we are police officers, stick them up,' and he complied with that order.
>
> "'The word (arrest) is "derived from the French, arreter, to stop or stay, and signifies a restraint of a man's person; depriving him of his own will and liberty, and binding him to become obedient to the will of the law. It is called the beginning of imprisonment." *Legrand* v. *Bodinger*, 4 T. B. Mon. (Ky.) 539, 540.' (5 C. J. 385.)
>
> "'An arrest consists in taking, under real or assumed authority, custody of another person for the purpose of holding or detaining him to answer a criminal charge or civil demand. . . . The custody or control, the assumption of which is involved in an arrest, imports actual restraint or detention, the mere utterance of words indicative of an arrest being insufficient, except perhaps when followed by submission . . . An arrest is not consummated until there has been a taking of possession of the person by manual caption or otherwise, but the requisite control may be assumed without force, and in any manner by which the subject of the arrest is brought within the power or control of the person making it. Nor is manual touching necessary, where the subject of the arrest submits thereto or is otherwise actually subjected to restraint. But, where the person resists arrest, some manual touching of the body has been held necessary to consummate the arrest.' (5 C.J. 385-6.)
>
> "'An arrest is the taking of a person into the custody of the law. It has also been judicially defined

as the taking, seizing, or detaining the person of another; touching or putting hands upon him, in the execution of process, or any act indicating an intention to arrest. . . . An arrest, in the strict legal sense of the term, involves three elements: *authority, intention, and a restraint of the person.* . . . There must be an intention, understood by the one arrested, to accomplish the arrest. . . . *A restriction of the right of locomotion is the most characteristic element of the arrest.* . . . An arrest is effected when the party is brought within the power of the officer, an actual manual touching not being essential.' (2 Am. & Eng. Ency. of Law [2d ed.] 834-6.)"

People v. *Mirbelle*, 276 Ill. App. 533, 540-541 (Emphasis supplied.)

In the case at bar, the arrest of the petitioner Henry occurred when his right to proceed along the public way was impeded. In this, we have the restriction of his right of locomotion. Next, he submitted to the authority of the arresting officers, and his acknowledgment of this is found in his words: "Hold it, it's the G." Lastly, the intention of the armed agents of the Federal Bureau of Investigation, driving headlong at the automobile occupied by the petitioner, indicates an intention to arrest. We respectfully invite this Court's speculation as to what would have occurred, had the defendants attempted to flee. Did the petitioner and his companion, therefore, have to risk being shot, or seriously injured by ramming, in order to prove the point of arrest? *United States* v. *Di Re*, 332 U.S. 581.

It would appear from the facts involved in this case that the Federal Bureau of Investigation was conducting a dragnet operation in the neighborhood in which the defendants were arrested. The agents and others apparently stopped and searched individuals, other than the petitioner,

with negative results. One Steve Bedlow was stopped by these agents, merely because he was seen talking to the defendants (App. 60). We can only speculate as to how many other people were subjected to this treatment.

The far-reaching effect of any stamp of approval by federal courts of this conduct will set a dangerous precedent for law-abiding citizens of this community. In Chicago, Illinois it is a well-known fact that the Police Commissioner has established what are known as "task forces", consisting of approximately one hundred and fifty local police officers, mounted on three-wheeled motorcycles. These "task forces" sweep into areas, and stop motorists on little or no pretext, with a view toward making searches and seizures of any and all articles found.

It seems apparent that the Federal Bureau of Investigation, upon notice that an amount of whiskey had been high-jacked, sent in a similar "task force" consisting of at least four units, to seek "leads" to said losses. These agents were embarked upon a course of conduct, designed to ferret out some clue to the whereabouts of the whiskey stolen, or the culprits involved therewith. It is the petitioner's contention that, quite by chance, these articles were found in the automobile in which he was riding as a passenger, and that the facts and circumstances existing —prior to the stopping of the vehicle— could by no stretch of the imagination lead the agents to conclude that a "federal offense" had been, or was being, committed. Nor were there any reasonable grounds so to believe. Even the Court of Appeals below does not state that what occurred prior to the stopping of the vehicle constituted reasonable grounds to arrest for a "federal offense." Their only conclusion was that it might afford grounds for stopping the automobile.

This concept conflicts with Illinois law on the subject. Therefore, this Court ought to exercise its jurisdiction.

IV.

The last reason why this Court ought to exercise its jurisdiction is based on the fact that the decision of the Court of Appeals below has sanctioned a departure from the accepted and usual course of judicial proceedings by a lower Court. The departure involves the affirmance of a conviction in which proof of a knowing and wilful violation must be established. It is the petitioner's contention that no such proof was made, but that both the District Court and the Court of Appeals below relied upon an improper interpretation of the presumption of unexplained possession of recently stolen goods. This presumption does not require an explanation from the petitioner, who did not take the stand in his own behalf. The explanation may be adduced from the facts presented by the government. The requirement that the petitioner must explain is erroneous. It is upon this requirement that the Courts below based the conviction.

The petitioner Henry makes the following observations with reference to the Court of Appeals' determination that as a matter of law, the evidence was sufficient to support a conviction as to him.

The Court of Appeals below, on this point in its opinion, at pp. 6 and 7, states as follows:

> " * * * However, in this case the record shows further that the car in which appellants were driving had been borrowed by Henry from one Wilbur Holtz who denied the presence of the cartons in his car at the time Henry took the vehicle. At the time they were stopped and questioned Pierotti untruthfully asserted that the car had been loaned to him. Agent Oitszinger testified of his observations of appellants'

> conduct set forth elsewhere in this opinion which shows clearly that Henry exercised dominion over the cartons completely inconsistent with the attempted explanation at the time of his arrest that the cartons were in the car when he got into it and that he did not know whom they belonged to. * * *"

The foregoing, then, is the basis upon which the Court of Appeals found sufficiency of the evidence.

Let us examine the Court of Appeals' statement a little more closely: First of all, "Pierotti untruthfully asserted that the car had been loaned to him." What effect can this statement of Pierotti's have possibly had upon the guilt of Henry, who, admittedly, had been drinking in various taverns since 7:30 that morning and who quite possibly was in no condition to drive. We respectfully submit that, under these circumstances, Henry had no obligation and maybe no ability to comment upon Pierotti's statement. This is not the case where a defendant, having been accused of something, and remaining mute, can be regarded as having admitted the truth of the accusation. By this statement, Pierotti cannot lift the connection between himself and Henry to the dignity of a conspiracy, thus binding Henry.

The opinion states that the petitioner Henry exercised dominion over the cartons. The record will disclose that neither of the two agents upon being asked directly could in any way *identify the cartons*, Govt. Ex. 1, 2, and 3, containing the radios, as being the same cartons Henry was observed to have carried out of the gangway into the automobile. The Court of Appeals cannot supply that evidence. The further portion of the Court's opinion that: "* * * the attempted explanation at the time of his arrest that the cartons were in the car when he got into it * * *" is not Henry's statement. It is that of Pierotti.

Reference is made to p. 3 of the Court's own opinion, wherein Agent Stadtmiller testified as to what Pierotti said.

Henry, on this record, said only two things:

1. "Hold it, it's the G!" and

2. "Tell them you just picked me up."

Statement 1 indicates a submission to the authority of the Federal Bureau of Investigation. Statement 2 is an indication that Henry had only been with Pierotti a short time, and this is borne out by the record. The proof clearly shows that at the time Pierotti was handling the merchandise in question, the petitioner Henry was either engaged in partaking of alcoholic refreshment, or looking after his interest in the Sport of Kings.

The petitioner is not unaware of the fact that, in reviewing the guilt or innocence of the accused, the Court of Appeals must view the record in the light most favorable to the government. However, this never precludes the review of circumstantial evidence. It cannot be assumed that, when circumstantial evidence is relied upon by the government as proof of the guilt of a person, such evidence must be viewed only in favor of the government's case. The petitioner Henry relies on the great weight of authority that, in viewing circumstantial evidence, this sort of evidence must exclude every reasonable hypothesis, other than that of guilt. To this end, the petitioner Henry respectfully submits a reasonable hypothesis of innocence. That the District Court and the Court of Appeals disregarded this hypothesis, he now claims as error. In *Kassin* v. *United States*, 87 F.2d 183, 184, the Court stated that circumstances which merely raise suspicion or give room for conjecture are not sufficient evidence of guilt and, where circumstantial evidence

is relied upon, " . . . the links in the chain must be clearly proven, and taken together, must point not to the possibility or probability, but to the moral certainty of guilt." (P. 187).

With this in mind, we invite this Court's attention to the circumstantial evidence which, we urge, clearly points to innocence. Without dispute, the following facts may be enumerated:

1. The petitioner Henry had been drinking in a tavern since 7:30 in the morning with the government's witness, Holtz.

2. At noon, Holtz asked the petitioner Henry if Henry knew where he could get a bet placed on a horse race.

3. The weather was bad, and Holtz loaned Henry the use of his automobile.

4. Pierotti was working on the dock of the Ziffrin Truck Lines and, by happenstance, handled the stolen radios sometime *in the forenoon*.

5. Pierotti left the dock at 1:30 P.M. and is next observed in the company of Henry at the Red Top Lounge at 2:10 P. M.

6. They are together in the automobile until about 2:40.

7. When arrested, Henry said only two things: "Hold it, it's the G." and "Tell them you just picked me up."

From the foregoing, the more reasonable hypothesis is that the petitioner Henry spent all of the forenoon at Phil's Tavern, drinking with one of the government's witnesses, Holtz. When Holtz indicated that he wanted

to bet on a horse race, Henry left Phil's Tavern in Holtz's automobile to see if he could place the bet. Apparently, in his visits to various places, he met the co-defendant Pierotti at the Red Top Lounge.

Quite independently of Henry on these facts, Pierotti had managed to get his hands on the radios, which he had handled at his place of employment. These radios were loaded in the morning, before noon (App. 43), at the time when Henry was drinking with the government witness, Holtz.

It would appear from the facts that, upon meeting Henry at the Red Top Lounge, Pierotti asked if Henry had any transportation. Henry probably said, "Yes," and Pierotti asked if he could run a short errand. Pierotti drove and possibly, quite properly so, in view of the defendant Henry's all day drinking. There is absolutely no proof whatever—on the record or circumstantially—other than the fact that Henry was in the vehicle with the stolen property, that suggests his guilt.

His admission of a possessory interest in the stolen goods was made under circumstances which can only give rise to the conclusion that it was admitted for the sole purpose of asserting his constitutional rights under the Fourth Amendment.

In conclusion, it is the petitioner's observation that, other than association with Pierotti, the government is without sufficient proof. At the beginning of this portion of the petition it was pointed out that the untruthful statements were made by Pierotti; that Henry did not exercise dominion over any cartons identified as Government's Exhibits 1, 2, and 3; and that Henry was not the one who said the cartons were in the car when he got into it. This was Pierotti's statement. We are back,

then, to what the Court of Appeals below said at p. 6 of the opinion: (App. 6a)

> "' ' ' If, as appellant Henry contends, the government's case had been based solely on the fact of his presence in the car which contained the stolen goods and his association with the other defendant, the government would have failed to prove unlawful and knowing possession on his part. *United States* v. *O'Brien*, 7 Cir., 174 F.2d 341, 344 (1949). ' ' '"

It is for this alone association that Henry stands convicted. We urge a ruling by this Court consistent with *United States* v. *O'Brien* (*supra*), *United States* v. *Caruso*, 198 F. 2d 3; *United States* v. *Wainer*, 170 F. 2d 603.

Moreover, if guilt be inferred from the evidence in this case, it must be inferred from circumstantial evidence. However, the circumstances must be such as to exclude every reasonable hypothesis, other than that of guilt. *Copeland* v. *United States*, 5 Cir., 90 F. 2d 78, 79 (1937); *Touchin* v. *United States*, 10 Cir., 93 F. 2d 861, 866 (1938); and where those circumstances are as consistent with innocence as with guilt, they have no probative value. *Tingle* v. *United States*, 8 Cir., 38 F. 2d 573, 575 (1930). Similarly, circumstances which merely raise suspicion or give room for conjecture are not sufficient evidence of guilt. *Kassin* v. *United States*, 5 Cir., 87 F. 2d 183, 184 (1937). In *Kassin*, the Court observed that where circumstantial evidence is relied upon, ". . . the links in the chain must be clearly proven, and taken together, must point not to the possibility or probability, but to the moral certainty of guilt." (P. 187.)

For all of the foregoing reasons, the petitioner urges on this point that the Court of Appeals below has sanctioned a departure from the accepted and usual course of judicial proceedings in the Court below.

CONCLUSION.

Wherefore, for the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

EDWARD J. CALIHAN, JR.,
Attorney for Petitioner

APPENDIX.

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 12306 — SEPTEMBER TERM AND SESSION, 1958

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOHN PATRICK HENRY and
ALBERT RUDOLPH PIEROTTI,
Defendant-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

OCTOBER 2, 1958

Before DUFFY, *Chief Judge*, HASTINGS and PARKINSON, *Circuit Judges*.

HASTINGS, *Circuit Judge*. Appellants, John Patrick Henry and Albert Rudolph Pierotti, were convicted under a one-count indictment charging them with the unlawful possession, in violation of Title 18 U.S.C.A. § 659, of three cartons of radios stolen from an interstate shipment. This appeal is based on alleged errors of the trial court in overruling the motions of both appellants to suppress evidence used in this cause and in its denial of appellant Henry's motion for a judgment of acquittal.

It is appellants' contention that the pre-trial hearing on their motions to suppress established that they were the victims of an unlawful arrest and search without warrant by agents of the Federal Bureau of Investigation and

that, consequently, the evidence uncovered in the search, the three cartons of radios, should properly have been suppressed.

George Stadtmiller, one of the two Federal agents who arrested appellants, was the only witness called by appellants in support of their motions to suppress and was, indeed, the sole witness in the pre-trial hearing on the motions. From his testimony are found the following facts: Agent Stadtmiller and Agent John J. Oitszinger who accompanied him were, on the day of the arrest, May 14, 1957, investigating leads to a reported theft of whiskey from the Hayes Freight Lines located in Chicago, Illinois, which had occurred the night before. Stadtmiller indicated that he was acquainted with both appellants, (although he was not asked to explain in what connection he knew them) and also testified that he had received information concerning the "*implication* of defendant Pierotti with interstate shipments," this information purportedly coming from a Mr. Lieberman, vice president of the Ziffrin Truck Lines and employer of Pierotti. There is no indication in the record in what manner Pierotti was so implicated.

Appellants were first observed by the agents, on the day of the arrest, emerging from the Red Top Lounge located at 2903 South Wallace Street, Chicago, Illinois, at about 2:10 p.m. They then walked to a 1953 two-door black and white Ford parked across the street and, with Pierotti driving, were observed to travel by a rather indirect route to an alley between Union and Lowe streets. The agents, who had followed, parked their car, walked to the end of the alley and observed Henry leave the car occupied by appellants and enter a gangway. Henry returned in about two minutes carrying some cartons which he placed in the car. Appellants drove off and were lost to the view of the agents. The agents then returned to their car and drove through various streets looking for appellants' car which they finally located parked in its original position opposite the Red Top Lounge on Wal-

lace Street. The agents parked nearby and shortly thereafter observed Henry and Pierotti leave the Lounge. After engaging in conversation with a man known to the agents as Steve Bellow, appellants returned to their car and drove back to the same alley where Henry was again observed getting out of the car, entering the gangway and returning shortly carrying some more cartons which he again placed in the car. The agents saw all this at a distance of some 300 feet and could not have known at that time the contents of the cartons, their number or size. Appellants then drove away, followed by the agents, and a few minutes later at about 2:50 p.m. were intercepted by the agents who motioned them to stop as the two cars approached each other traveling along Wallace Street. Henry got out of the car leaving the car door open and approached the agents. He was overheard to say to Pierotti: "Hold it. It's the G's," and "Tell him he [you?] just picked me up." The three cartons bearing shipping labels which indicated they were part of an interstate shipment *were plainly visible to Agent Stadtmiller through the open door of the car.*

Stadtmiller testified further that:

> "... We asked them about the ownership of the car, and Mr. Pierotti said it wasn't his car, and he said it was Babe's car, and that he had borrowed it. And we asked him about the cartons that were in the car, and he said that they were in the car when he ...
>
> "The Court: Just a minute. All right, go ahead.
>
> "By the Witness:
>
> "A. (Continuing) We asked him about the cartons that were in the car, and he said that they were in the car at the time he borrowed it from the owner.
>
> "Q. What, if anything, else was said by you to the defendants and by the defendants to you at that time and place?
>
> "A. Well, after they said, after Mr. Pierotti said the cartons were in the car at the time he borrowed it, we asked them if they had just been at the Red

Top Lounge, and Mr. Henry said that he may have been earlier that day as he was visiting numerous taverns. Mr. Pierotti said he had just got off work at 2:30:

"Q. Do you know of your own knowledge whether or not that was correct?

"A. Well, I had seen him at 2:10 away from work."

Appellants were then taken into custody. It was ultimately determined, between 4:30 and 5:00 p.m. of that day, that the cartons in question had been stolen from a motor truck of the Ziffrin Truck Lines, and appellants were then *officially informed* that they were under arrest and of the charges against them.

Appellants raise the contention that the stopping of their car and resulting discovery of the cartons of radios plainly visible through the open door of the car was an unlawful search. Under the Fourth Amendment to the Constitution a lawful search of a car moving on a public thoroughfare may be had without a warrant providing probable cause for the search exists. *Brinegar* v. *United States*, 338 U.S. 160 (1949); *Carroll* v. *United States*, 267 U.S. 132 (1925).

The Supreme Court of the United States in the *Carroll* case observed that:

> "On reason and authority the rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction the search and seizure is valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when adopted, and in a manner which will conserve public interests as well as the rights of individual citizens.
>
> . . .
>
> "The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid

> the payment thereof, are totally different things from a search for and seizure of a man's private books or papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto cœlo*. In one case the Government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law. . . ."
> *Carroll* v. *United States*, *supra* at 149-150

In the *Brinegar* case the Supreme Court stated that probable cause "has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their [the officers] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense is being committed." *Brinegar* v. *United States*, *supra* at 175-176.

This court has defined probable cause as "reasonable grounds of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged . . . [A]nd what constitutes probable cause must be determined from the standpoint of the officer with his skill and knowledge, rather than from the standpoint of the average citizen under similar circumstances." *United States* v. *Scho*, 7 Cir., 101 F. 2d 889, 890 (1939). The agent need not have legal evidence of a suspected illegal act. *Brinegar* v. *United States*, *supra* at 174-175; *Gilliam* v. *United States*, 6 Cir., 189 F. 2d 321, 323 (1951). It is only necessary that the facts and attendant circumstances are such as would lead a reasonably prudent man to believe that articles are illegally possessed in the automobile to be searched. *Husty* v. *United States*, 282 U.S. 694, 701 (1931).

We hold that there existed probable cause for the search in this case. The agents, while investigating for leads to a reported theft of whiskey which had occurred the previous night, observed appellants' unusual behavior

set forth above. Both appellants were known to the agents, and appellant Pierotti known by them to be involved or implicated in interstate shipments in some manner. As in the *Brinegar* and *Carroll* cases, no problem of search of a home or other place of privacy is involved. These cases involve the freedom to use public thoroughfares in swiftly moving vehicles for dealing in contraband. Not every traveler may be stopped and searched at an officer's whim or mere suspicion, but it is clear that here the facts within the agents' knowledge amounted to more than mere suspicion and constituted probable cause for their action in stopping appellants' car.

The arrest and taking into custody of appellants followed the discovery of the cartons of radios bearing the shipping labels indicating that they were part of an interstate shipment and the far from satisfactory explanation by appellants in regard to the ownership of the cartons. Agents of the Federal Bureau of Investigation are empowered by statute to "make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have *reasonable grounds to believe that the person to be arrested has committed or is committing such felony.*" (Our emphasis.) 18 U.S.C.A. 3052. The agents on finding the cartons of radios in the car had reasonable ground to believe that the felony of illegal possession of goods stolen from an interstate shipment was then being committed and the arrest was therefore valid. See *Bell* v. *United States*, D.C. Cir., 254 F. 2d 82 (1958); *Walker* v. *United States*, 7 Cir., 246 F. 2d 518 (1957); and *Gilliam* v. *United States*, 6 Cir., 189 F. 2d 321 (1951). The fact that there had been no reported theft of radios from an interstate shipment cannot be seriously considered as an indication that the agents acted without "reasonable grounds." An arresting officer deals in probabilities, not certainties and not necessarily eventual truth. *Brinegar* v. *United States*, *supra* at 176; *Bell* v. *United States*, *supra* at 86. The trial court properly denied appellants' motion to suppress.

Appellant Henry contends further that, as a matter of law, the evidence was not of sufficient weight to support a conviction as to him and that, therefore, the trial court erred in denying his motion for judgment of acquittal. In considering appellant's contention in this regard this court may not weigh the evidence nor determine the guilt or innocence of the accused and must view the record in the light most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *Grieg* v. *United States*, 7 Cir., 246 F. 2d 155, 157 (1957); *United States* v. *Iacullo*, 7 Cir., 226 F. 2d 788, 795 (1955). If, as appellant Henry contends, the government's case had been based solely on the fact of his presence in the car which contained the stolen goods and his association with the other defendant, the government would have failed to prove unlawful and knowing possession on his part. *United States* v. *O'Brien*, 7 Cir., 174 F. 2d 341, 344 (1949). However, in this case the record shows further that the car in which appellants were driving had been borrowed by Henry from one Wilbur Holtz who denied the presence of the cartons in his car at the time Henry took the vehicle. At the time they were stopped and questioned Pierotti untruthfully asserted that the car had been loaned to him. Agent Oitszinger testified of his observations of appellants' conduct set forth elsewhere in this opinion which shows clearly that Henry exercised dominion over the cartons completely inconsistent with the attempted explanation at the time of his arrest that the cartons were in the car when he got into it and that he did not know whom they belonged to. This court held in *Wilkerson* v. *United States*, 7 Cir., 41 F. 2d 654, 657, (1930) that:

> "Possession of the fruits of crime recently after its commission justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence."

We hold that the evidence supports the conviction of Henry and that the trial court did not err in denying his motion for judgment of acquittal.

The judgment of the district court is

AFFIRMED.

PARKINSON, *Circuit Judge*, dissenting.

In order to sustain the judgment of conviction in this case the Government is obliged to justify the search as being incident to a lawful arrest. This it cannot do and I am, therefore, compelled to dissent.

On the day of the arrest federal agents were investigating leads to a whiskey loss from the Hayes Freight Lines which had occurred the night before. Agents Stadtmiller and Oitszinger were in a car so engaged. The defendants "were driving south in the 2600 block on Wallace, and we (the agents) were headed north, and we (the agents) intercepted their path." The agents "drove directly in front of" the car in which the defendants were riding and made "a head-on stop".

Counsel for the Government stated in oral argument before this court that when the federal agents stopped the defendants' car the arrest of the defendants occurred right then and there. Thus it is clear that unless the agents had probable cause to *then* believe that the defendants had committed a felony cognizable under the laws of the United States that arrest was not a valid one and any search incident thereto was unlawful. The search at its commencement must be valid and cannot be saved by what it turns up. "In law it is good or bad when it starts and does not change character from its success." *U.S. v. Di Re*, 1948, 332 U.S. 581, 595.

The parties are in agreement that probable cause means more than bare suspicion. The Government's contention that there was probable cause to arrest the defendants when the federal agents stopped defendants' car is based solely upon three factors: 1. the defendants were seen carrying cartons, the number, size and contents of which were completely unknown to the agents, which the defendants placed in the back of their automobile; 2. the agents were "acquainted" with the defendants; and 3. a Mr. Lieberman, vice-president of Ziffrin Truck Lines, for which the defendant Pierotti worked, had told Agent Stadtmiller that Pierotti had been "implicated" with interstate shipments.

QUESTIONS PRESENTED

1. Whether there was probable cause to stop a motor vehicle in which stolen property was discovered.

2. Whether the evidence supported petitioner's conviction.

STATEMENT

On January 24, 1958 petitioner (together with a co-defendant, Albert Pierotti) was convicted by the trial court without a jury (R. 35) of the unlawful possession of three cartons of radios stolen from an interstate shipment (18 U.S.C. 659) (R. 72). Petitioner was sentenced to imprisonment for a year and a day (R. 72).

1. Before trial, petitioner filed a motion to suppress as evidence the three cartons of radios taken from his possession by F.B.I. agents (R. 7-9), contending that the articles were obtained by an illegal search and seizure (R. 8). In support of this contention in a pre-trial hearing, petitioner introduced the testimony of George Stadtmiller, one of the F.B.I. agents who seized the cartons of radios. Agent Stadtmiller's testimony showed that he and another agent, John Oitszinger, were, on the day of the arrest, May 13, 1957, investigating leads to a reported theft of whiskey from a freight line in Chicago (R. 16). Stadtmiller stated that he was acquainted with petitioner and Pierotti and that he knew from Pierotti's employer of Pierotti's "implication * * * with interstate shipments" (R. 21, 22). Petitioner and Pierotti were first observed by the agents at 2:10 p.m. across the

Again in oral argument before this court the Government admitted that it could not explain what had been meant by the words "acquainted" and "implicated". It has not been argued, nor from this record could it be so argued, that any connotation unfavorable to defendants must or should be placed upon these words. They stand alone unexplained and undefined and as such they are meaningless. They cannot be twisted and contorted into personal knowledge by the agents that the defendants were criminals or were known to be involved in federal law violations as were the defendants in the *Carroll* and *Brinegar* cases.

Not only were the agents unable to tell anything about the cartons prior to the arrest but on subsequent examination it was shown that whereas the agents were looking for and expected to find stolen whiskey the cartons contained no such thing. Moreover, after the agents had opened the cartons and examined the contents they were unable to say what crime, if in fact any at all, had been committed.

In the *Walker* case the evidence clearly showed that the arresting federal agents had personal knowledge given to them by an informer which furnished probable cause to believe a federal felony was being committed. Thus this court held the arrest was valid and the search incidental thereto lawful. Likewise in the *Gilliam* case the federal agents had personal knowledge that the defendant was a bootlegger and they had been furnished with information by an officer that clearly constituted probable cause. It is that sort of direct evidence of personal knowledge that is completely lacking in the case at bar.

The *Bell* case has no application here. There the arresting officers were policemen of the District of Columbia. They stopped the defendant's car after he had pulled away from the curb and had driven some two blocks without lights at 3:30 o'clock in the morning. The officers could have properly arrested the defendant for driving without lights.

street from the Red Top Tavern (R. 18). They got into a car, drove for a few blocks, and parked in an alley between Union and Lowe Streets (R. 18, 19). Petitioner got out of the car, entered a gangway, and returned in a few minutes carrying cartons (R. 19). Petitioner got into the car, with Pierotti driving, and drove away. Later the car was again seen parked at the Red Top Tavern (R. 19). The F.B.I. agents parked across the street from the tavern and waited for the defendants to emerge. Soon the defendants came out of the tavern, got into the same car, and returned to the same alley between Union and Lowe Streets where petitioner entered the gangway and returned carrying cartons (R. 20). Petitioner was observed to walk around the front of the car carrying the cartons and he and Pierotti then drove off (R. 20). The agents met them a few blocks away, the agents being headed north and the defendants south (R. 12). The agents intercepted the car, and waived to them as they approached (R. 12, 20, 21). Petitioner and Pierotti stopped their car. Petitioner got out of the car saying to Pierotti as he did so, "Hold it, it is the G's" and "Tell him he [you?] just picked me up" (R. 21-23, 54). Stadtmiller inquired about the ownership of the car and Pierotti said that he had borrowed it from a friend named "Babe" (R. 24). When asked if they had just been to the Red Top Tavern, petitioner said "No" but that he might have been there that morning. Pierotti said that he "just got off work at 2:30" (R. 24).

As Stadtmiller walked alongside of the car, he noticed that there were cartons in the car with an

Apart from the fact that the record in the *Carroll*, *Husty* and *Brinegar* cases clearly disclosed evidence of personal knowledge of the arresting federal agents that each defendant was a bootlegger and engaged in illegal trafficking of liquor in violation of The National Prohibition Act and thereby had probable cause sufficient to search their respective automobiles, Mr. Justice Jackson speaking for the court in *U. S. v. Di Re*, 1948, 332 U.S. 581, points up the clear distinction between such cases and the one here when he speaks on page 584 as follows:

> "The belief that an automobile is more vulnerable to search without warrant than is other property has its source in the decision of *Carroll* v. *United States*, 267 U.S. 132. That search was made and its validity was upheld under the search and seizure provisions enacted for enforcement of the National Prohibition Act and of that Act alone."

Again we say there is no evidence of personal knowledge by the federal agents here that the defendants or either of them could have been suspected of interstate shipment thefts at the time the path of their car was intercepted by the agents and they were arrested and taken into custody. It was at that time probable cause had to exist for when their car was stopped by the agents intercepting its path and driving directly in front of them and making a head-on stop I think the arresting officers were then in the position of an officer who has entered a home; *i.e.*, the search at that time had to be valid and could not be saved by what it later uncovered.

In my opinion the search of defendants' automobile was in clear violation of the Fourth Amendment. I would, therefore, reverse and remand with instructions to sustain the motions to suppress.

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago 10, Illinois

Thursday, October 2, 1958

Before

Hon. F. Ryan Duffy, Chief Judge

Hon. John S. Hastings, Circuit Judge

Hon. W. Lynn Parkinson, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JOHN PATRICK HENRY & ALBERT RUDOLPH PIEROTTI, *Defendants-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 12306	

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois
Tuesday, November 4, 1958
Before
Hon. F. Ryan Duffy, Chief Judge
Hon. John S. Hastings, Circuit Judge
Hon. W. Lynn Parkinson, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JOHN PATRICK HENRY & ALBERT RUDOLPH PIEROTTI, *Defendants-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 12306	

It is ordered by this Court that the petition for rehearing filed in the above cause be, and the same is hereby, DENIED.

SUPREME COURT, U. S.

Office Supreme Court
FILED
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No. 57

In the Supreme Court of the United States

OCTOBER TERM, 1958

JOHN PATRICK HENRY, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 559

JOHN PATRICK HENRY, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-10a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 2, 1958. A petition for rehearing was denied on November 4, 1958. The petition for a writ of certiorari was filed on December 4, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

"Admiral" shipping label showing that they were being shipped to Cincinnati (R. 13). Stadmiller then told petitioner and Pierotti that "the cartons looked like they had been stolen" and he asked them if they "would come down to the office" (R. 14, 25). Petitioner and Pierotti said the cartons were in the car when they borrowed it but they consented to go with the agents (R. 14, 24). After learning that the cartons of radios had been stolen from the Ziffrin Truck Lines, the agents placed petitioner and Pierotti under arrest at about 5:00 p.m. (R. 12, 16, 17).

The motion to suppress was denied by the trial court and the case was set for trial (R. 32, 34).

2. The testimony as to the actions of the defendants prior to the stopping of the car, the statements of petitioner when the car stopped, the observation of the cartons and the statements by defendants that the cartons were in the car when it was borrowed were repeated at the trial in testimony by agent Oitszinger (R. 51-57). In addition, Wilbur Holtz testified that about noon on the day of the arrest he loaned his car to petitioner and that at that time there were no "Admiral" cartons in it (R. 37-39). The value of the merchandise and the fact of theft from an interstate shipment were stipulated (R. 35).[1]

[1] Wallace Nunes and Joseph Teodorczyk, dock hands at the Ziffrin Truck Lines, testified that, on the morning of the arrest, Pierotti helped to load a shipment of "Admiral" cartons, similar to the ones found in petitioner's possession, on to a Ziffrin trailer bound for Cincinnati (R. 39-51). Mr. Nunes testified that Pierotti left work at 1:30 that day (R. 41). This testimony was admitted against Pierotti only (R. 41, 47).

At the close of the government's case, motions for judgments of acquittal as to both petitioner and Pierotti were denied by the trial court (R. 71) and they were convicted (R. 72-75).

ARGUMENT

Petitioner devotes much of his argument to a discussion of whether the arrest occurred at the time the agents intercepted the car in which he was riding or at some time thereafter. He argues that, because (1) the arrest took place when the car was stopped and (2) probable cause was then lacking, the arrest and the ensuing search and seizure were illegal (Pet. 11-15). In emphasizing the question of when the arrest occurred, petitioner misconceives the government's position and the holding of the court below. As the dissenting judge below noted (Pet. 8a), "Counsel for the Government stated in oral argument before this court that when the federal agents stopped the defendants' car the arrest of the defendants occurred right then and there". Although the point is arguable (see *Jordan* v. *United States*, 254 F. 2d 710 (C. A. 8); *Gilliam* v. *United States*, 189 F. 2d 321 (C. A. 6); cf. *Brinegar* v. *United States*, 338 U. S. 166, 178 (concurring opinion of Mr. Justice Burton)), we adhere to the government's concession below. We urge, however, that the crucial question is not the time of the arrest but whether probable cause existed at the time the car was stopped, for federal agents have no authority, under the circumstances of this case[2] to stop an automobile unless

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[2] Cf. *Brinegar* v. *United States*, 338 U. S. 160, 183 (dissenting opinion of Justice Jackson).

probable cause exists at the time of stoppage. The court below recognized this, and properly applying the "reasonable man" test promulgated by this Court in *Brinegar* v. *United States*, 338 U. S. 160, held that agents Stadtmiller and Oitszinger in fact had probable cause to stop the automobile. If, as the court held, such probable cause existed, the statements of petitioner and his co-defendant and the personal observations of the agents clearly justified their belief that the fruits of the crime they believed petitioner to have committed were contained in the automobile and sanctioned the search of the car and seizure of the stolen property. Thus, the crucial issue presented by the petition is not the abstract question of what constitutes a technical arrest but whether, on the facts of this case, the quantum of information available to the agents constituted probable cause.

The co-defendant Pierotti's employer, an officer of a freight company, had furnished F. B. I. agent Stadtmiller with "information concerning the implication of the defendant Pierotti with interstate shipments" (R. 21). Agent Stadtmiller had had a conversation with Pierotti and petitioner, but a defense objection as to the nature of the conversation was sustained (R. 21). On the day of the arrest, agents

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[illegible] (p. 6, [illegible]) "[e]very traveler may be [illegible] suspicion of an officer's whim or mere suspicion, [illegible] the facts as to the agents' knowl[illegible] [illegible] suspicion and *constituted* [illegible] *in stopping appellants' car*" (emphasis added).

of the F.B.I. were cruising about looking for leads to a theft of whiskey from an interstate shipment (R. 15, 16, 21, 51). Agents Stadtmiller and Oitszinger observed Pierotti and petitioner walking across the street from the Red Top Tavern in the neighborhood of the whiskey theft (R. 15, 18). Pierotti and petitioner entered a car parked nearby and drove to an alley where they parked (R. 19, 51, 52). The agents followed the car and observed petitioner get out of the car, enter a gangway, and return to the car in a few minutes carrying cartons (R. 19, 52). The car, with Pierotti driving, drove off and the surveilling agents lost contact with it. The agents returned to the Red Top Tavern and observed that the car they had been following was again parked across from the tavern and was unoccupied (R. 19). The agents parked their car and observed Pierotti and petitioner return to the car. They were not carrying anything. Pierotti again drove the car with the petitioner to the same alley where the car stopped, the petitioner got out, and went to the gangway, returning with cartons (R. 20, 53). Pierotti and petitioner drove off and were followed by the agents who, suspecting their implication in the whiskey theft,[4] interrupted and stopped their car (R. 12, 22, 54).

Taking all these circumstances together, the majority of the court below correctly concluded that the agents had probable cause for stopping the car under the decisions of *Brinegar v. United States*, 338

[4] Petitioner's trips to and from the tavern were particularly significant since the tavern might have been an outlet for the disposal of stolen liquor.

U. S. 160; *Carroll* v. *United States*, 267 U. S. 132; and *Husty* v. *United States*, 282 U.S. 694.

If, as we have shown, probable cause existed for believing that petitioner was guilty of the theft from an interstate shipment of cases of liquor, it is, of course, immaterial that the theft detected involved radios. Cf. *Harris* v. *United States*, 331 U. S. 145. The legality of the arrest must be measured by the beliefs the arresting agents actually and reasonably entertained, but if the arrest is based on probable cause, the fruits or instruments of any crime the defendant has in fact committed are subject to seizure in the search incident to that arrest.

The events that occurred thereafter—the observation of the sealed cartons destined for Cincinnati, the statements by defendants as to their previous whereabouts shortly before, which the agents knew from personal observation to be untruthful—added to the previous knowledge which the agents had and were clearly sufficient to confirm the agents' belief that petitioners had committed a felony and that the stolen goods were in the automobile. The agents thus had a proper basis for searching the car and seizing the cartons.

2. The sufficiency of the evidence to support the conviction does not present an issue warranting review by this Court. The government's case against petitioner did not rest merely on the presumption arising from recent possession of stolen property. When stopped, petitioner jumped out of the car and yelled to Pierotti, "Hold it, it's the G's" and "Tell them you just picked me up". (R. 23, 54). Petitioner

denied that he had just been to the Red Top Lounge and that he had been in the alley where the agents observed him pick up the cartons (R. 57). He also stated that he did not know whose car he was riding in and that when he got into the car the cartons were already there (R. 56, 57). Wilbur Holtz testified that earlier that day he had met petitioner in the Red Top Lounge, that he loaned him his car and that there were no cartons in the car at that time (R. 36-39). This evidence showed a consciousness of guilt which the trier of fact was justified in crediting and which, together with the presumption, supports the conviction.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. [redacted] 17

JOHN PATRICK HENRY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR PETITIONER, JOHN PATRICK HENRY.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 559

JOHN PATRICK HENRY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR PETITIONER, JOHN PATRICK HENRY.

OPINION OF THE COURT BELOW.

The opinion in the Court of Appeals (R. 80-89) is reported at 259 F.2d 725.

JURISDICTION.

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on October 2, 1958. (R. 90). On November 4, 1958, it was ordered that the petition for rehearing be denied. (R. 91) The petition for certiorari was filed within thirty days of the denial of the petition

for rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Was it not error for the Court of Appeals to sustain the ruling of the District Court, denying the defendant's motion to suppress the evidence, which was secured by agents of the Federal Bureau of Investigation, in violation of the defendant's rights under the Fourth Amendment to the Constitution of the United States?

2. Does the Fourth Amendment to the Constitution of the United States permit the stopping of an individual riding in a motor vehicle on the public highway, detention and questioning of said individual, search of the vehicle in which he is riding as a passenger, physical deprivation of his freedom of movement, without such conduct constituting an arrest? Is the arrest delayed or inchoate until the federal officers choose to inform him that he has been "formally" arrested some three hours after the original detention, where the original stopping of the vehicle and detention of the person was without probable cause for an arrest or search?

(a) Will facts developed by the officers during the detention, and from it, justify this procedure?

3. Where armed agents of the Federal Bureau of Investigation have no warrant of arrest or search warrant, does their act of stopping an automobile, occupied by the driver and the petitioner, a passenger, traveling on a public thoroughfare in Chicago, Illinois, constitute an arrest, where the occupants of said automobile remained in continuous custody of the Federal Bureau of Investigation until their arraignment before the United States Commissioner on the following day?

4. Does such an arrest occur at the moment when the automobile is stopped by the compulsion of the government agents, or was the arrest delayed until following the stopping, when the questions asked of the occupants were not satisfactorily answered?

5. Where the United States Court of Appeals has distorted, by its interpretation of *Brinegar* v. *United States*, 338 U.S. 160 and *Carroll* v. *United States*, 267 U.S. 132, the meaning of these cases in order to sustain a search without warrant, and where no facts exist constituting probable cause to make an arrest, or to obtain a search warrant, should not this Court reverse on the principle that a search in law is good or bad when it starts, and does not change character from its success?

6. Where it appears from the evidence that the defendant, JOHN PATRICK HENRY, was convicted solely on the government's evidence of his presence as a passenger in an automobile, which contained stolen goods discovered after his arrest, and his fleeting twenty minute association with the other defendant, should it not be determined, as a matter of law, that there was insufficient evidence to authorize a conviction in a case where the defendant offered no evidence, but relied upon a motion for judgment of acquittal at the close of the government's case?

7. Where the facts in evidence explain the proximity of stolen goods found in an automobile in which the petitioner is a passenger, does the presumption or inference, that the unexplained "possession" of recently stolen property will authorize conviction, apply?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.

Section 659 Title 18 U.S.C.A. (63 Stat. 91) in so far as pertinent to this case, provides:

> "Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or
>
> "Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; * *"

Section 3052, Title 18 U.S.C.A., 64 Stat. 1239, provides:

> Section 3052. POWERS OF FEDERAL BUREAU OF INVESTIGATION The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and *make arrests without warrant for any offense against the United States* committed in their presence, or for any felony cognizable under the laws of the United States if *they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.* As amended Jan. 10, 1951, c. 1221, Section 1, 64 Stat. 1239. (Emphasis supplied)

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE.

A one-count indictment, 57 CR 355, was returned against the defendants, JOHN PATRICK HENRY and ALBERT RUDOLPH PIEROTTI, on May 21, 1957, charging them with the unlawful possession of three (3) cartons of radios of a value in excess of $100.00, which had theretofore been stolen from an interstate shipment, in violation of Section 659, Title 18, United States Code. The defendants each moved to suppress the evidence in this cause and after hearing by the Court, said motions were respectively denied on October 22, 1957. Subsequently, the motions to suppress were amended, and were again denied on November 25, 1957.

Defendants waived a jury and trial commenced on January 23, 1958; it was concluded on the same day. Both defendants moved for acquittal at the close of the government's evidence, and offered no evidence in their own behalf.

The defendants were convicted in the Court below, and were each sentenced to terms of one year and one day in the custody of the Attorney General.

EVIDENCE.

On May 13, 1957 the defendants JOHN PATRICK HENRY and ALBERT RUDOLPH PIEROTTI were arrested by George Stadtmiller and John Oitzinger, agents of the Federal Bureau of Investigation. The agents were in the vicinity

of 26th Street and Wallace Avenue, looking for leads to a "whiskey loss" of the Hayes Freight Line at 26th and Canal (R. 15-51). There was testimony that there were three or four FBI units in the area on the same assignment (R. 15-58). The agents first observed the defendants in a 1953 Ford automobile, driven by Mr. Pierotti (R. 12). The defendants were in an alley between Lowe St. and Union Avenue, and the alley ran from 26th to 28th Streets. The defendant Henry got out of the passenger side of the automobile, entered a gangway, and several minutes later, he returned to the automobile, carrying some cartons (R. 19). The agents were approximately 300 feet from the defendants. The defendants drove off in the automobile, and the agents lost track of them.

Several minutes later, the agents saw the automobile parked in the vicinity of the intersection of Wallace Avenue and 29th Street. The agents observed the two defendants leave the Red Top Lounge, reenter the automobile and return to the alley, where they had first observed them. Again, the defendant Henry left the automobile, went into a gangway, and returned carrying several cartons. The defendants again drove off. The agents, upon this occasion, were approximately 300 feet away (R. 20). When questioned as to the size of the cartons, or any identification or markings, Agent Oitzinger stated he could not even tell the size from that distance, and was unable to identify them as being the cartons identified as government's exhibits 1, 2 and 3, containing the radios, which were alleged to have been stolen. Agent Oitzinger further testified that he could not even tell whether the defendant Henry was carrying groceries in the cartons (R. 58). Stadtmiller could not tell whether they were full or empty, nor could he read any description (R. 25).

After the defendants drove away, the agents again temporarily lost sight of them, and shortly thereafter observed the defendants in the 1953 Ford, driving south in the 2600 block of Wallace Avenue. The FBI agents were proceeding north on the same street. The agents thereupon drove directly, in a head-on manner, at the defendants in their 1953 Ford, and Agent Stadtmiller motioned for the defendants to stop with his hand out of the FBI automobile window. Both cars stopped, and the agents motioned the defendants out of the automobile (R. 21).

A search of the vehicle was thereupon made, and the cartons containing the radios, the subject matter of the indictment herein, were discovered. Even then, they were not sure of an offense (R. 68). The agents established that the defendants' possession of the vehicle was lawful. In the trunk of the vehicle was a carton of cleaning material, which was subsequently shown not to have been stolen. The agents then took the defendants to the Chicago office of the FBI and, after several hours, determined that the radios had been taken from a motor truck of the Ziffrin Truck Lines. It was also established that the agents had called other truck lines to determine whether any truck line had suffered a radio loss (R. 16-17).

Thereafter, the defendants were *formally* placed under arrest—some time after 5 P. M. — or approximately three hours after they were first arrested on the street (R. 25, 63). Evidence was presented on the motion to suppress in which the defendants contended that there was no probable cause to make the arrest without warrant and incidental search. The trial court denied the motion.

At the trial of the case, the evidence adduced by the government may be summarized as follows:

A stipulation was entered into between the government and the defendants as to the interstate shipment; the value of the articles; that the articles were stolen on the date alleged in the indictment and from the place alleged in the indictment. The government also referred to the pleadings in which the defendants, by their motion to suppress, allege occupancy of the vehicle in which the articles were found, and by the amendment to the motion to suppress allege possession of the said articles (R. 35).

The following is a summary of the testimony of the witnesses:

Wilbur Holtz:

This witness stated that he saw JOHN PATRICK HENRY in Phil's Tavern at about 12 o'clock noon on May 13, 1957. The witness had been drinking since 7:30 in the morning, and asked the defendant Henry whether the defendant knew where the witness could bet on a horse. Henry said he wasn't sure, but might be able to find out, and asked permission to use the witness' 1953 Ford, in which both defendants were later apprehended. The witness gave Henry the keys and Henry took the vehicle. This witness denied the presence of any cartons of radios in his vehicle (R. 36-39).

Wallace Nunes:

This witness said he was a dock hand at Ziffrin Truck Lines, and on May 13, 1957 was working with the defendant, ALBERT RUDOLPH PIEROTTI, who was also employed at said truck line. In addition to the defendant Pierotti, the witness said one Joe Teodorczyk was working with them, unloading cartons of radios. The trailer was completely loaded and checked by noon. The defendant Pierotti asked

Nunes to punch his time card out at 2:30, even though Pierotti left the premises about 1:30. When Pierotti left the dock at 1:30, he was empty-handed (R. 39-45).

Joe Teodorczyk:

This witness testified that he was employed by the Ziffrin Truck Lines on May 13, 1957, and was working with Albert Rudolph Pierotti and Wallace Nunes in the loading of some cartons of radios on a Ziffrin trailer. This witness testified that he counted the cartons coming off of a Steffke trailer, from which the shipment was received, and on to the Ziffrin trailer across the dock. He stated that he counted them coming off of the Steffke trailer and all of them were placed on the Ziffrin trailer.

On cross examination, he stated that at least seven (7) persons had access to the Ziffrin trailer, which was loaded with additional material subsequent to the radio cartons being loaded (R. 45-51).

John Oitzinger:

This witness was an agent of the Federal Bureau of Investigation, who testified that he was assigned with Agent Stadtmiller to investigate the theft of whiskey from an interstate shipment of the Hayes Freight Line. He testified to the observation of the defendants, HENRY and PIEROTTI, as hereinbefore set forth. Apparently, Oitzinger conducted the questioning after the men were stopped, and Oitzinger determined at that time the ownership of the vehicle (R. 51-56). Oitzinger admitted that at least four or five cars, with one or two agents, were in the vicinity, looking for leads to the Hayes whiskey loss (R. 57). When he first saw the defendants, he could not tell what size carton Henry was carrying (R. 58). After Henry

and Pierotti were arrested, Oitzinger also stopped one Bedalow, who was driving a 1946 Ford sedan. Oitzinger said that this man was stopped merely because he was seen talking to Henry and Pierotti in front of the Red Top Lounge (R. 60). Oitzinger said that he had no warrant for the arrest of either Henry or Pierotti (R. 63).

Upon cross-examination, when asked whether the defendants were in violation of any law, so far as the agents knew, at the time the agents observed the defendants, the question was objected to and sustained by the Court (R. 63).

This witness also testified that a search of the vehicle in which the defendants were riding was made by Agent Stadtmiller (R. 67). After Agent Stadtmiller took the three cartons out of the defendants' automobile, the witness said to the defendants:

> "There is something wrong here, this isn't right. Let's go down to our office." (R. 68).

The government thereupon rested, after introducing the cartons of radios (R. 69).

The defendants offered no evidence, and moved for a judgment of acquittal. After argument, said motion was denied.

SUMMARY OF ARGUMENT.

I. That the arrest of the petitioner occurred at the moment when the federal agents stopped the motor vehicle on the public highway, and exercised restraint upon the individuals, and that subsequent questioning and the finding of stolen goods could not give validity to the original arrest, which was made without probable cause. An arrest without warrant is subject to interpretation in the light of the laws of the state where said arrest was made. Illinois law supports the position that the arrest occurred at the point where restraint was first exercised upon the motor vehicle and its occupants.

II. The petitioner was convicted solely upon the government's evidence of his presence as a passenger in an automobile which contained recently stolen goods, discovered after his arrest, and his fleeting twenty-minute association with the other defendant. The law does not require the defendant to extricate himself from a situation where the circumstances are as consistent with innocence as they are with guilt.

ARGUMENT.

I.

THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES DOES NOT PERMIT THE STOPPING OF AN INDIVIDUAL RIDING IN A MOTOR VEHICLE ON A PUBLIC HIGHWAY, DETENTION AND QUESTIONING OF SAID INDIVIDUAL, SEARCH OF THE VEHICLE IN WHICH HE IS RIDING AS A PASSENGER, PHYSICAL DEPRIVATION OF HIS FREEDOM OF MOVEMENT, WITHOUT SUCH CONDUCT CONSTITUTING ARREST. ANY FACTS DEVELOPED BY THE OFFICERS AFTER THE STOPPING OF THE MOTOR VEHICLE WILL NOT JUSTIFY OR GIVE VALIDITY TO THE ACT OF STOPPING.

The significance of the moment of arrest is bottomed on the principles of the Fourth Amendment to the Constitution of the United States, which define the rights of people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. This search and seizure was claimed to be incidental to arrest, and the principal questions here presented are 1) At what point did the arrest occur? and 2) Was the evidence discovered after the arrest? The time of arrest and therefore the validity of the evidence secured thereby is crucial because the motion to suppress such evidence, upon which the conviction is based, was denied below.

The evidence demonstrates that the agents of the Federal Bureau of Investigation drove headlong at the defendants' automobile, each car then traveling in an opposite direction, and motioned the petitioner and the driver of the automobile to stop and get out of the car. The petitioner stated, "Hold it! It's the G" (R. 23).

If the arrest occurred at that point, as the petitioner contends, then the subsequent finding of the radios, which were the subject of the indictment herein, could not make good the original arrest. The agents, in calling upon the defendants to stop their vehicle, did so by virtue of their official position. The evidence is such that the agents testified that the defendants knew they were federal officers (R. 54). The compulsion exercised by these officers then and there, in depriving the defendants of their freedom of proceeding along a public highway, constituted an arrest. These agents were armed men, ordering the defendants to stop, and they blocked the way of the defendants with their car. The petitioner contends that the restraint of his freedom of locomotion, thus inducing a reasonable apprehension that force would be used, unless there were submission, constitutes an arrest. It is enough to constitute an arrest, if the conduct of the officers operates on the will of the persons threatened, and results in a reasonable fear of personal difficulty or personal injury.

Therefore, if, as the petitioner contends, the arrest took place at the point of stopping, any subsequent look into the automobile, or questioning of the occupants, even if only a short time later, was an incident to the arrest. If probable cause did not exist prior to the finding of the cartons of radios, the subsequent finding cannot save the arrest. In connection with the problem here, the majority opinion of the Court of Appeals below stated in its opinion: (R. 86)

> "* * * the facts within the agents' knowledge amounted to more than mere suspicion and constituted probable cause for their action in stopping appellants' car.
>
> "The arrest and taking into custody of appellants followed the discovery of the cartons of radios bearing the shipping labels indicating that they were part of an interstate shipment and the far from satisfac-

> tory explanation by appellants in regard to the ownership of the cartons. * * * The agents on finding the cartons or radios in the car had reasonable ground to believe that the felony of illegal possession of goods stolen from an interstate shipment was then being committed and the arrest was therefore valid. * * *"

On the other hand, the dissenting opinion (R. 89) states:

> "Again we say there is no evidence of personal knowledge by the federal agents here that the defendants or either of them could have been suspected of interstate shipment thefts at the time the path of their car was intercepted by the agents and they were arrested and taken into custody. It was at that time probable cause had to exist for when their car was stopped by the agents intercepting its path and driving directly in front of them and making a head-on stop I think the arresting officers were then in the position of an officer who has entered a home; *i.e.*, the search at that time had to be valid and could not be saved by what it later uncovered.
>
> "In my opinion the search of defendants' automobile was in clear violation of the Fourth Amendment. I would, therefore, reverse and remand with instructions to sustain the motions to suppress."

Parenthetically, it should be noted at this point that the dissenting opinion makes the following observation pertinent to this portion of the brief: (R. 87)

> "Counsel for the Government stated in oral argument before this court that when the federal agents stopped the defendants' car the arrest of the defendants occurred right then and there. Thus it is clear that unless the agents had probable cause to *then* believe that the defendants had committed a felony cognizable under the laws of the United States that arrest was not a valid one and any search incident thereto was unlawful. The search at its commencement must be valid and cannot be saved by what it

> turns up. 'In law it is good or bad when it starts and does not change character from its success.' *U. S.* v. *Di Re*, 1948, 442 U.S. 581, 595."

It is therefore our position that the point of arrest is vital. The Court of Appeals below, in its majority opinion, has indicated one standard for stopping the automobile, and another standard for making the arrest. In other words, it appears that the agents may have had a suspicion that something was amiss, and thus, this suspicion could justify the stopping of the motor vehicle. Inherent in their opinion is the recognition that, by no stretch of the imagination, could the reasonably prudent agents have concluded that a federal offense was being committed. The Court of Appeals below, therefore, attempts to say in one paragraph of its opinion that the agents had probable cause to stop the vehicle. In the next paragraph, having stopped the vehicle, and having found that answers to their questions were not satisfactory, and having examined certain cartons, and having made a three-hour investigation as to the nature of the packages, which ultimately resulted in evidence that the packages had recently been stolen, the Court of Appeals has concluded that the agents had probable cause to make such an arrest. The opinion indicates that the initial arrest was made *after* the discovery of the cartons, and *after* the far from satisfactory explanation, and that the *formal arrest* occurred some three hours later in the offices of the Federal Bureau of Investigation. It is interesting to note that, even after the finding of the cartons of the radios in the automobile, Agent Oitzinger said (R. 68):

> "* * * I told them that 'there is something wrong here, this isn't right.' I said, 'Let's go down to our office.' "

It is the petitioner's further assertion that this Court, in *Giordenello* v. *United States*, 357 U.S. 480, 78 S. Ct.

1245, has recently reaffirmed the holding of *United States* v. *Di Re*, 332 U.S. 581, and *United States* v. *Rabinowitz*, 339 U.S. 56. For the Court of Appeals below to contend that the arrest can follow the actual restraint of the individual, who has been continuously in the custody of the Federal Bureau of Investigation from the point of the stopping of the automobile to the arraignment before the United States Commissioner on the following day, is in direct conflict with the above-cited cases.

The petitioner has quoted hereinabove portions of the majority opinion of the Court of Appeals below. It is further contended that said opinion is in conflict with leading cases in the State of Illinois on the subject of when an arrest occurs. In *People* v. *Mirbelle*, 236 Ill. App. 533, on the point involved herein, the decision of the Appellate Court is recognized and followed as authority in Illinois. The case holds:

> "In the instant case the People contend that 'defendant was not arrested until after officers viewed the concealed weapon on his person.' On the other hand, defendant strenuously contends that he was arrested when the officers, with drawn weapons, 'hollored' to him to 'stick them up, we are police officers, stick them up,' and he complied with that order.
>
> "'The word (arrest) is "derived from the French, arreter, to stop or stay, and signifies a restraint of a man's person; depriving him of his own will and liberty, and binding him to become obedient to the will of the law. It is called the beginning of imprisonment." *Legrand* v. *Bedinger*, 4 T.B. Mon. (Ky.) 539, 540.' (5 C.J. 385.)
>
> "'An arrest consists in taking, under real or assumed authority, custody of another person for the purpose of holding or detaining him to answer a criminal charge or civil demand. . . . The custody or control, the assumption of which is involved in an arrest,

imports actual restraint or detention, the mere utterance of words indicative of an arrest being insufficient, except perhaps when followed by submission. . . . An arrest is not consummated until there has been a taking of possession of the person by manual caption or otherwise, but the requisite control may be assumed without force, and in any manner by which the subject of the arrest is brought within the power or control of the person making it. Nor is manual touching necessary, where the subject of the arrest submits thereto or is otherwise actually subjected to restraint. But, where the person resists arrest, some manual touching of the body has been held necessary to consummate the arrest.' (5 C.J. 385-6.)

"'An arrest is the taking of a person into the custody of the law. It has also been judicially defined as the taking, seizing, or detaining the person of another; touching or putting hands upon him, in the execution of process, or any act indicating an intention to arrest. . . . An arrest, in the strict legal sense of the term, involves three elements: *authority, intention and a restraint of the person.* . . . There must be an intention, undersfood by the one arrested, to accomplish the arrest. . . . *A restriction of the right of locomotion is the most characteristic element of the arrest.* . . . An arrest is effected when the party is brought within the power of the officer, an actual manual touching not being essential.' (2 Am. & Eng. Ency. of Law [2d ed.] 834-6.)"

People v. *Mirbelle*, 276 Ill. App. 533, 540-541. (Emphasis supplied.)

In the case at bar, the arrest of the petitioner Henry occurred when his right to proceed along the public way was impeded. In this, we have the restriction of his right of locomotion. Next, he submitted to the authority of the arresting officers, and his acknowledgment of this is found in his words: "Hold it, it's the G." Lastly, the

intention of the armed agents of the Federal Bureau of Investigation, driving headlong at the automobile occupied by the petitioner, indicates an intention to arrest. We respectfully invite this Court's speculation as to what would have occurred, had the defendants attempted to flee. Did the petitioner and his companion, therefore, have to risk being shot, or seriously injured by ramming, in order to prove the point of arrest? *United States* v. *Di Re*, 332 U.S. 581.

It would appear from the facts involved in this case that the Federal Bureau of Investigation was conducting a dragnet operation in the neighborhood in which the defendants were arrested. The agents and others apparently stopped and searched individuals, other than the petitioner, with negative results. One Steve Bedlow was stopped by these agents, merely because he was seen talking to the defendants (R. 60). We can only speculate as to how many other people were subjected to this treatment.

The far-reaching effect of any stamp of approval by federal courts of this conduct will set a dangerous precedent for law-abiding citizens of this community. In Chicago, Illinois it is a well-known fact that the Police Commissioner has established what are known as "task forces", consisting of approximately one hundred and fifty local police officers, mounted on three-wheeled motorcycles. These "task forces" sweep into areas, and stop motorists on little or no pretext, with a view toward making searches and seizures of any and all articles found.

It seems apparent that the Federal Bureau of Investigation, upon notice that an amount of whiskey had been high-jacked, sent in a similar "task force" consisting of at least four units, to seek "leads" to said losses. These

agents were embarked upon a course of conduct, designed to ferret out some clue to the whereabouts of the whiskey stolen, or the culprits involved therewith. It is the petitioner's contention that, quite by chance, these articles were found in the automobile in which he was riding as a passenger, and that the facts and circumstances existing —prior to the stopping of the vehicle—could by no stretch of the imagination lead the agents to conclude that a "federal offense" had been, or was being, committed. Nor were there any reasonable grounds so to believe. Even the Court of Appeals below does not state that what occurred prior to the stopping of the vehicle constituted reasonable grounds to arrest for a "federal offense." Their only conclusion was that it might afford grounds for stopping the automobile.

The Court does say that the automobile travelled by a "rather indirect route" (R. 81). It seems quite clear on the record that the defendants, who were parked at 2903 South Wallace, in front of the Red Top Lounge, drove south to the end of that block which was 30th Street, turned to the right in a westerly direction to the next block, Lowe Street, and then proceeded north on Lowe Street to 28th Street and, again, west to an alley between Lowe Street and the following street, which was Union (R. 18, 19, 20, 53, 54). The only other way to proceed to the destination was to make a U-Turn from 2903 and head immediately north to 28th Street. So the only circumstance is that the defendants, in broad daylight (roughly two o'clock in the afternoon), were observed to go around the block, down two streets, and into an alley, and pick up cartons which could not be seen sufficiently to identify. In no instance was any disposition of the cartons observed.

Another leading case in the State of Illinois is *The People v. Scalisi*, 324 Ill. 131, which held that when a

police squad gave chase to a motor vehicle, the police squad was attempting to arrest the occupants. The Court held at p. 150:

> "When the police squad sought to infringe upon the liberty of plaintiffs in error and arrest and detain them for questioning they had no reasonable ground to suspect that either plaintiffs in error had been guilty of any crime, and plaintiffs in error were not nightwalkers or vagrants, and hence the attempt to arrest and detain them was unlawful. • • •"

It is respectfully submitted that the foregoing authorities have controlling weight, as it has long been settled that the law of the State, where an arrest without warrant for a federal offense takes place, determines its validity, in the absence of applicable federal statute. *United States* v. *Di Re*, 332 U.S. 581; *Johnson* v. *United States*, 333 U.S. 10, and *Coplon* v. *United States*, 191 F. 2d 749.

Many federal cases are to like effect: *United States* v. *Hanlon*, 50 F. 2d 465, which held that the stopping of an automobile and ordering its driver to pull up, constituted coercion, and the statement of the driver was given after the search and seizure had commenced. *United States* v. *Hamm*, 163 F. Supp. 4, holding that the search of an individual prior to a lawful arrest makes the search illegal, and the evidence obtained therefrom must be suppressed. *United States* v. *O'Connell*, 43 F. 2d 1005, held that, when suspicious circumstances prompted the agents to stop an automobile and subsequently liquor was found, such a search was unlawful. *Clay* v. *United States*, 239 F. 2d 196, is a case which holds that the mere act of a known gambler driving an automobile on the public highway will not justify an officer forcing him to stop to be searched or arrested for a suspected violation of the Federal Wagering Tax Act.

It is respectfully submitted that no probable cause existed here to justify the stopping, questioning, and detention of the petitioner. The subsequent finding of the radios cannot support the arrest. The motion to suppress below should have been sustained.

II.

THE EVIDENCE IS NOT OF SUFFICIENT WEIGHT, AS A MATTER OF LAW, TO SUPPORT THE CONVICTION OF THE PETITIONER, WHERE THE COURTS BELOW PRINCIPALLY RELIED UPON AN IMPROPER INTERPRETATION OF A SO-CALLED PRESUMPTION THAT UNEXPLAINED POSSESSION OF RECENTLY STOLEN GOODS WILL AUTHORIZE A CONVICTION.

The Court of Appeals below has sanctioned a departure from the accepted and usual course of judicial proceedings by a lower Court. The departure involves the affirmance of a conviction in which proof of a knowing and wilful violation must be established. It is the petitioner's contention that no such proof was made, but that both the District Court and the Court of Appeals below relied upon an improper interpretation of the presumption of unexplained possession of recently stolen goods. This presumption does not require an explanation from the petitioner, who did not take the stand in his own behalf. The explanation may be adduced from the facts presented by the government. The requirement that the petitioner must explain is erroneous. It is upon this requirement that the Courts below based the conviction.

The petitioner Henry makes the following observations with reference to the Court of Appeals' determination that as a matter of law, the evidence was sufficient to support a conviction as to him.

The Court of Appeals below, on this point in its opinion (R. 86), states as follows:

> "* * * However, in this case the record shows further that the car in which appellants were driving had been borrowed by Henry from one Wilbur Holtz who denied the presence of the cartons in his car at the time Henry took the vehicle. At the time they were stopped and questioned Pierotti untruthfully asserted that the car had been loaned to him. Agent Oitszinger testified of his observations of appellants' conduct set forth elsewhere in this opinion which shows clearly that Henry exercised dominion over the cartons completely inconsistent with the attempted explanation at the time of his arrest that the cartons were in the car when he got into it and that he did not know whom they belonged to. * * *"

The foregoing, then, is the basis upon which the Court of Appeals found sufficiency of the evidence.

Let us examine the Court of Appeals' statement a little more closely: First of all, "Pierotti untruthfully asserted that the car had been loaned to him." What effect can this statement of Pierotti's have possibly had upon the guilt of Henry, who, admittedly, had been drinking in various taverns since 7:30 that morning and who quite possibly was in no condition to drive. We respectfully submit that, under these circumstances, Henry had no obligation and maybe no ability to comment upon Pierotti's statement. This is not the case where a defendant, having been accused of something, and remaining mute, can be regarded as having admitted the truth of the accusation. By this statement, Pierotti cannot lift the connection between himself and Henry to the dignity of a conspiracy, thus binding Henry.

The opinion states that the petitioner Henry exercised dominion over the cartons. The record will disclose that

neither of the two agents upon being asked directly could in any way *identify the cartons*, Govt. Ex. 1, 2, and 3, containing the radios, as being the same cartons Henry was observed to have carried out of the gangway into the automobile. The Court of Appeals cannot supply that evidence.

Henry, on this record, said two significant things:

1. "Hold it, it's the G!" and

2. "Tell them you just picked me up."

Statement 1 indicates a submission to the authority of the Federal Bureau of Investigation. Statement 2 is an indication that Henry had only been with Pierotti a short time, and this is borne out by the record. The proof clearly shows that at the time Pierotti was handling the merchandise in question, the petitioner Henry was either engaged in partaking of alcoholic refreshment, or looking after his interest in the Sport of Kings.

The petitioner is not unaware of the fact that, in reviewing the guilt or innocence of the accused, the Court of Appeals must view the record in the light most favorable to the government. However, this never precludes the review of circumstantial evidence. It cannot be assumed that, when circumstantial evidence is relied upon by the government as proof of the guilt of a person, such evidence must be viewed only in favor of the government's case. The petitioner Henry relies on the great weight of authority that, in viewing circumstantial evidence, this sort of evidence must exclude every reasonable hypothesis, other than that of guilt. To this end, the petitioner Henry respectfully submits a reasonable hypothesis of innocence. That the District Court and the Court of Appeals disregarded this hypothesis, he now claims as error. In *Kassin*

v. *United States*, 87 F. 2d 183, 184, the Court stated that circumstances which merely raise suspicion or give room for conjecture are not sufficient evidence of guilt and, where circumstantial evidence is relied upon, "* * * the links in the chain must be clearly proven, and taken together, must point not to the possibility or probability, but to the moral certainty of guilt." (P. 187.)

With this in mind, we invite this Court's attention to the circumstantial evidence which, we urge, clearly points to innocence. Without dispute, the following facts may be enumerated:

1. The petitioner Henry had been drinking in a tavern since 7:30 in the morning with the government's witness, Holtz.

2. At noon, Holtz asked the petitioner Henry if Henry knew where he could get a bet placed on a horse race.

3. The weather was bad, and Holtz loaned Henry the use of his automobile.

4. Pierotti was working on the dock of the Ziffrin Truck Lines and, by happenstance, handled the stolen radios sometime *in the forenoon*.

5. Pierotti left the dock at 1:30 P.M. and is next observed in the company of Henry at the Red Top Lounge at 2:10 P.M.

6. They are together in the automobile until about 2:40.

7. When arrested, Henry said two things:

"Hold it, it's the G," and "Tell them you just picked me up."

From the foregoing, the more reasonable hypothesis is that the petitioner Henry spent all of the forenoon at Phil's Tavern, drinking with one of the government's witnesses, Holtz. When Holtz indicated that he wanted to bet on a horse race, Henry left Phil's Tavern in Holtz's automobile to see if he could place the bet. Apparently, in his visits to various places, he met the co-defendant Pierotti at the Red Top Lounge.

Quite independently of Henry on these facts, Pierotti had managed to get his hands on the radios, which he had handled at his place of employment. These radios were loaded in the morning, before noon (R. 43), at the time when Henry was drinking with the government witness, Holtz.

It would appear from the facts that, upon meeting Henry at the Red Top Lounge, Pierotti asked if Henry had any transportation. Henry probably said, "Yes," and Pierotti asked if he could run a short errand. Pierotti drove and possibly, quite properly so, in view of the defendant Henry's all day drinking. There is absolutely no proof whatever—on the record or circumstantially—other than the fact that Henry was in the vehicle with the stolen property, that suggests his guilt.

His admission of a possessory interest in the stolen goods was made under circumstances which can only give rise to the conclusion that it was admitted for the sole purpose of asserting his constitutional rights under the Fourth Amendment. (See R. 31) *U.S. v. Chieppa*, 241 F.2d 635[1] may have no effect on the Court of Appeals for the 7th Circuit, in view of their consistent position that you must allege a possessory interest.

---

[1] The Court of Appeals for the Second Circuit there held that the occupants of a motor vehicle had sufficient possessory interest in the contents of said vehicle to entitle them to move for the suppression of same as evidence.

In conclusion, it is the petitioner's observation that, other than association with Pierotti, the government is without sufficient proof. We are back, then, to what the Court of Appeals below said in its opinion: (R. 86)

> "* * * If, as appellant Henry contends, the government's case had been based solely on the fact of his presence in the car which contained the stolen goods and his association with the other defendant, the government would have failed to prove unlawful and knowing possession on his part. *United States* v. *O'Brien*, 7 Cir., 174 F.2d 341, 344 (1949). * * *"

It is for this alone—association that Henry stands convicted. We urge a ruling by this Court consistent with *United States* v. *O'Brien* (*supra*). *United States* v. *Caronella*, 198 F. 2d 3; *United States* v. *Wainer*, 170 F. 2d 603.

Moreover, if guilt be inferred from the evidence in this case, it must be inferred from circumstantial evidence. However, the circumstances must be such as to exclude every reasonable hypothesis, other than that of guilt. *Copeland* v. *United States*, 5 Cir., 90 F. 2d 78, 79 (1937); *Toubin* v. *United States*, 10 Cir., 93 F. 2d 861, 866 (1938); and where those circumstances are as consistent with innocence as with guilt, they have no probative value. *Tingle* v. *United States*, 8 Cir., 38 F. 2d 573, 575 (1930). Similarly, circumstances which merely raise suspicion or give room for conjecture are not sufficient evidence of guilt. *Kassin* v. *United States*, 5 Cir., 87 F. 2d 183, 184 (1937). In *Kassin*, the Court observed that where circumstantial evidence is relied upon, ". . . the links in the chain must be clearly proven, and taken together, must point not to the possibility or probability, but to the moral certainty of guilt." (P. 187.)

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No. 17

In the Supreme Court of the United States

OCTOBER TERM, 1959

JOHN PATRICK HENRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 17

JOHN PATRICK HENRY, PETITIONER

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UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 80-89) is reported at 259 F. 2d 725.

JURISDICTION

The judgment of the Court of Appeals (R. 90) was entered on October 2, 1958. Petitioner's motion for a rehearing was denied on November 4, 1958 (R. 91). The petition for a writ of certiorari was filed on December 4, 1958, and granted on February 24, 1959, 359 U.S. 904; R. 91. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether federal officers, at the time they stopped the automobile in which petitioner was riding, had

probable cause to believe that the occupants had committed or were committing a felony cognizable under the laws of the United States.

2. Whether the evidence supported petitioner's conviction for the offense of unlawful possession of goods stolen from an interstate shipment.

STATUTES AND CONSTITUTIONAL AMENDMENT INVOLVED

18 U.S.C. 659 provides, in pertinent part:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or
>
> Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; * * *
>
> * * * * *
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both. * * *

18 U.S.C. 3052 provides:

> The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investi-

> gation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Petitioner and one Albert R. Pieratti were tried before the District Court for the Northern District of Illinois (a jury having been waived) on a charge of possessing three cartons of radios, valued at more than $100, which had been stolen from an interstate shipment. The court found both defendants guilty and sentenced them to imprisonment for a year and a day (R. 4-5, 72-75). The Court of Appeals affirmed (R. 80-91).

A. THE MOTION TO SUPPRESS

Prior to trial, petitioner filed a motion to suppress as evidence the three cartons of radios. This motion

did not allege that petitioner owned or possessed either the automobile in which the radios were found or the radios themselves (R. 7-9). After the hearing on the motion, however, an amendment was filed, alleging that on the day in question petitioner "was in possession of the within described goods and merchandise, as specified in the indictment, and that he had a proprietary interest in the said goods and merchandise" (R. 29). The motion to suppress was denied.

The only witness who testified at the hearing of this motion was George Stadtmiller, a special agent of the Federal Bureau of Investigation. We shall summarize, *first*, his testimony as to facts and circumstances known to him prior to the stopping of the automobile and, *second*, his testimony as to the events which directly followed.

(1) Agent Stadtmiller testified that, on May 13, 1957, he and another agent (Oitzinger) were investigating a theft from an interstate shipment of whiskey which had occurred the night before at 25th and Canal Streets in Chicago (R. 15, 21). At about 2:10 p.m., they saw petitioner and Pierotti walking across the street from the Red Top Tavern, located at 2903 South Wallace Street, Chicago (R. 18). Stadtmiller testified that he had previously conversed with these two men, but the nature of this conversation was not revealed, the court sustaining a defense objection to such an inquiry (R. 21). The United States Attorney then asked Stadtmiller (R. 21-22):

> Q. Had you ever received any information concerning the implication of the defendant Pierotti with interstate shipments?

Mr. PIEROTTI [attorney for defendant Pierotti]. Object.

The COURT. He may answer.

By Mr. WATTERS [United States Attorney]:

Q. Will you answer that please?

The COURT. Yes or no.

By the WITNESS:

A. Yes.

By Mr. WATTERS:

Q. From whom did you receive that information?

A. Mr. Lieberman, vice-president of Ziffrin Truck Lines.

Q. Is Mr. Lieberman the employer of defendant Pierotti?

A. Yes, sir.

The agents saw petitioner and Pierotti walk along the west side of the street and get into a 1953 black and white two-door Ford. With Pierotti at the wheel, they drove (south) to 30th Street, west to Lowe Street, north to 28th Street and then west to an alley between Union and Emerald Streets, with the two F.B.I. agents following. Just before reaching the entrance to the alley, the Ford paused momentarily, straddling the pedestrian crosswalk (R. 18). The Ford backed up and turned around, heading east, and then (in the next block) turned north into an alley running between Union and Lowe Streets (R. 19).

Stadtmiller got out of the Bureau car, walked to the alley entrance and observed the Ford about three-quarters of the way up the alley. Petitioner got out and entered a gangway. He was emptyhanded at

the time. He came out of the gangway about two minutes later carrying cartons, walked around in front of the car, got in and drove off (north) to 26th Street, on which he turned east (R. 19). After an unsuccessful attempt to catch up with the Ford, the agents returned to the Red Top Tavern and found the Ford parked across the street in the spot where they had first seen it.

After a time, petitioner and Picretti came out of the Tavern. They were not carrying anything. They stopped and talked for several minutes with a man named Steve Bodiqw and then returned to their Ford and drove off (R. 20). The agents followed them to the same alley, at which point the Ford was again driven in. Petitioner got out, went in the same gangway, and returned about two minutes later carrying more cartons. Stadtmiller was about 200 feet away while observing these movements. He did not know what was in the cartons (R. 25). The Ford then drove north to 26th Street, on which it turned east. The agents also drove east (their car being on 28th Street) and they intercepted the Ford when it headed south on Wallace Street. Stadtmiller motioned it to stop (R. 12, 20-21).

(2) Petitioner got out of the Ford, leaving the door open. Stadtmiller thought he heard him say, "Hold it; it is the G's." This was followed by, "Tell him he [you] just picked me up." (R. 22-23) Stadtmiller went up to the Ford, on the driver's side, and looked in. He saw some cardboard cartons bearing "Admiral" shipping labels which showed that the cartons were addressed to a company in Cincinnati. Two of

the cartons were sealed and the flap was open on the third (R. 13). The agents asked who owned the car and were told by Pierotti that he had borrowed it from somebody named "Babe". Asked about the cartons, he said that they were already in the car when it was borrowed. When the men were asked if they had just been at the Red Top Tavern, petitioner said he might have been there earlier that day, as he had been visiting numerous taverns. Pierotti said that he had just got off work at 2:30 (R. 24).

Stadtmiller took the car keys and opened the trunk, but found nothing of consequence (R. 13-14). After searching the Ford, the agents took the cartons and put them in the Bureau car. They asked petitioner and Pierotti to come to the office. All four got into the Bureau car and proceeded to the office, leaving the Ford parked on the street. This was about ten or fifteen minutes before three o'clock (R. 14-15). It was ascertained by inquiries made of various trucking firms that the cartons had been stolen from the Ziffrin Truck Lines. Shortly before 5:00 o'clock, petitioner and Pierotti were placed under arrest (R. 12, 17-18, 25).

B. EVIDENCE AT THE TRIAL

The three cartons of Admiral radios taken from the automobile used by petitioner and Pierotti were introduced in evidence. It was stipulated that these goods were stolen, that they had the statutory value and that they had been in interstate commerce at the time of the taking (R. 68-69, 33). John J. Oitzinger, the F.B.I. agent who assisted Stadtmiller, gave essentially the same account of the chain of events as

Stadtmiller had given at the hearing on the motion to suppress (R. 51-69). He also indicated that the alley premises from which the stolen goods were loaded into the car were residential premises (R. 61-62).

The owner of the Ford testified that he had loaned it to petitioner rather than to Pierotti, as the latter had stated (R. 241) on the morning of the day in question to enable petitioner to bet on a horse for him. There were no Admiral cartons in the car when it was loaned to petitioner (R. 36-39).

SUMMARY OF ARGUMENT

There is considerable authority in decisions of the courts of appeals for the proposition that less may be required for purposes of an officer's stopping an individual and making an inquiry (albeit this does involve a temporary restraint or detention) than is required for purposes of search, seizure, or arrest. Throughout these proceedings, however, this case has been argued by the Government's attorneys on the assumption that the United States was required to show "probable cause," in the traditional sense, as of the time that the officers halted the vehicle in which petitioner and his companion were riding. And the case was decided by the Court of Appeals on the basis that probable cause existed when the officers intercepted the automobile. We shall defend the judgment on the basis upon which it was rendered.

I

The concept of "probable cause" does not require the possession of evidence which would be sufficient

to convict. It is enough, as the term itself indicates, that a man of reasonable caution would be warranted in believing that the persons involved had committed an offense. In making an assessment of the circumstances, one must view them as they appeared to the officers at the time, and not by hindsight. The conduct of officers cannot be condemned, if they acted reasonably, because a violation other than the one anticipated was discovered. Contraband found during a lawful search is subject to seizure, even though it was not the original object of the search.

Viewed in totality, the circumstances known to the officers warranted their belief, as of the time that the vehicle was halted, that a federal crime had been committed. The following factors are to be taken into account: (1) a whiskey theft (from an interstate shipment) had been reported the previous day; (2) cruising in the neighborhood of the theft, the officers saw petitioner and his companion near a tavern; (3) both men were known to the officers, who had information that one of them, an employee of a trucking concern, had been "implicated" in connection with interstate shipments; (4) the men (with the officers following) proceeded by car, taking a somewhat indirect route and exhibiting some hesitation, to an alley; (5) there, they proceeded to pick up cartons (although the premises were not ordinary business premises) and load them into the car; (6) shortly thereafter, the car reappeared at its original spot near the tavern; (7) it was reoccupied by the two men after a brief interval and the same performance, *i.e.*, going to the alley and making a further pick-up, was repeated.

This course of conduct hardly appeared consistent with normal and honest behavior. Rather, it strongly indicated to the officers, who were trained observers, that the persons under surveillance were handling stolen goods (as, indeed, proved to be the fact). Moreover, it was reasonable for the officers to believe (though in this respect they proved mistaken) that the cartons loaded into the car in the course of the mysterious journeys were the cartons of whiskey which had recently been stolen in the neighborhood, and that the tavern was being used as an outlet. Plainly, it was out of question for the officers to secure a warrant for the search of the vehicle. It was evident that the cartons would soon be removed from the car, just as the previous load had been. In the circumstances, the officers were entitled to proceed without delay in executing their duties of law enforcement.

II

The evidence of guilt is clearly sufficient to sustain conviction. It was stipulated at the trial that the cartons of radios taken from the car were of the statutory value, that they had been shipped in interstate commerce, and that they had been stolen while in commerce. The only open issue, therefore, was whether the trier of the facts was justified in concluding that petitioner was a party to the theft.

The circumstances summarized above (Point I) fully support—indeed, they would seem to compel—that inference. Moreover, events which occurred after the vehicle was stopped provide further corroboration. Thus, there was evidence establishing that petitioner

borrowed the car used to carry the stolen property; that the car contained no contraband when the owner parted with it; and that the alibi proffered by petitioner to the officers was completely false.

ARGUMENT

INTRODUCTION

The Court of Appeals decided this case on the ground that, from the time the officers first stopped the car in which petitioner was riding, there was probable cause for believing that the two men in the vehicle were in the act of committing a felony, *to wit*, illegal possession of goods stolen from an interstate shipment. Thus, following a discussion of this Court's decisions on the subject of "probable cause"—specifically, *Carroll* v. *United States*, 267 U.S. 132, *Husty* v. *United States*, 282 U.S. 694, and *Brinegar* v. *United States*, 338 U.S. 160—the court below declared (R. 84-85): "* * * it is clear that here the facts within the agents' knowledge amounted to more than mere suspicion and constituted probable cause for their action in stopping appellants' car." This is the holding below; it is not altered because the court went on to indicate (R. 85) that the grounds of the officers' belief were strengthened after they spoke to the two men and viewed the exposed cartons in the car.[1]

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[1] Petitioner argues (Br. 12-15) that the court below relied upon developments which took place subsequent to the stopping of the vehicle and that this was impermissible because the arrest took place at the moment of stoppage and could not be justified thereafter if it was not warranted *ab initio*. As indicated in the text, we think that this is a misreading of the opinion.

We defend the judgment (Point I, *infra*, pp. 16–20) on the basis upon which it was rendered, *i.e.*, that "probable cause," in the traditional sense, existed as of the time that the vehicle was stopped. If this Court agrees, it need go no further. If, however, this Court should assess the facts differently and disagree with the Court of Appeals on this issue of probable cause, there will remain an alternative theory upon which the Court might proceed to sustain the judgment. We do not urge this alternative theory upon the Court in this case—for reasons which we note below—but shall set it forth in summary before proceeding to our principal argument.

The alternative theory to which we refer is the theory which forms the basis of Mr. Justice Burton's concurring opinion in *Brinegar* v. *United States*, *supra*, a case which involved the stopping of an automobile and the search of its contents (revealing the possession of liquor being transported in violation of federal law). The concurring opinion states (338 U.S. at 179):

> It is only by alertness to proper occasions for prompt inquiries and investigations that effective prevention of crime and enforcement of law is possible. Government agents are commissioned to represent the interests of the public in the enforcement of the law and this requires affirmative action not only when there is reasonable ground for an arrest or probable cause for a search but when there is reasonable ground for an investigation. This is increasingly true when the facts point directly to a crime in the course of commission in the pres-

> ence of the agent. Prompt investigation may then not only discover but, what is still more important, may interrupt the crime and prevent some or all of its damaging consequences.

The view that something less may be required for purposes of an officer's stopping an individual and making an inquiry than is required for purposes of search, seizure, or arrest has been clearly stated in two very recent decisions of the Eighth Circuit, *Smith* v. *United States*, 264 F. 2d 469, and *McCarthy* v. *United States*, 264 F. 2d 473. Thus, in the *Smith* case, the court held (p. 472):

> Where the situation involved is one of such seeming probability, an Alcohol Tax Unit agent is warranted in stopping a car, with indication of his official status, for the purpose of inquiring of the occupants as to his identity or making observation of the vehicle. Probable cause may perhaps not at that time exist for searching the interior of the car, but if there is a warranting basis for stopping the vehicle, such information as the agent acquires in incidence, from proper acts of conversation or observation, is legally entitled to be taken into account in testing the probable cause which can be regarded as existing as to a subsequent search in which the agent may engage.[2]

[2] In the companion *McCarthy* case, the court declared (p. 475): "Whether, if the stopping had resulted in adding no further elements to the situation, the agents would have been justified in making a search of the car, we do not decide. As in the Smith case, elements were properly added by the stopping, which, in conjunction with what the agents had previously seen and knew, were entitled to be regarded as constituting adequate probable cause to warrant the search and seizure thereafter made." Note, also, the opinion of the

Although we think that a sound distinction may be drawn in proper cases between (1) a stopping and a limited detention for purposes of inquiry or investigation and (2) arrest in the usual criminal-law sense of "taking of a person into custody in order that he may be forthcoming to answer for the commission of an offense", we do not deem it appropriate for the Government to press this point as a

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Sixth Circuit in *Gilliam v. United States*, 189 F. 2d 321, 323: "The question presented is not whether probable cause existed before the automobile was stopped and the officers talked with appellant. The question is whether the combination of what the officers saw with the reliable information they had received is probable cause to justify the search." For other cases adopting this approach, see *Turner v. Cox*, 125 F. 2d 849 (C.A. 5); *Hall v. United States*, 235 F. 2d 248 (C.A. 5); *Cohen v. United States*, 231 F. 2d 262 (C.A. 5), certiorari denied, 351 U.S. 984; *Lawson v. United States*, 264 F. 2d 706 (C.A. 8); *Jordan v. United States*, 254 F. 2d 710 (C.A. 8); *Morgan v. United States*, 159 F. 2d 85 (C.A. 10); *Fredricks v. United States*, 239 F. 2d 93 (C.A. 10); *Green v. United States*, 259 F. 2d 180 (C.A.D.C.), certiorari denied, 359 U.S. 917.

The quoted definition is that of the American Law Institute in its Code of Criminal Procedure (Section 18). See, also, Perkins, *The Law of Arrest*, 25 Iowa L. Rev. 201, in which the author comments (pp. 258-259):

> "When officers arrive at a place where a serious crime has just been committed, they may require persons found there to remain at that place for a reasonable time for questioning. This is neither arrest, nor imprisonment. It is a technical 'confinement', but since it is very temporary and is a necessary incident to the proper exercise of a privilege, the word 'imprisonment' is not applied to it. The situation is comparable to the temporary detention of the driver of a truck while a duly authorized inspector tests the weight, or the momentary stopping of a motorist while an officer with proper authority calls for and examines his driver's license. The length of the detention for such questioning is considerably greater than that for

basis of decision in this case. (The Government, we note parenthetically, does propose to develop the point fully in the pending case of *Rios v. United States*, No. 52, this Term.) The reasons are as follows: In the Court of Appeals, the United States Attorney advised the court (R. 87) "that when the federal agents stopped the * * * car the arrest of the defendants occurred right then and there." The case was argued and decided in that court on the assumption that it was necessary to show "probable cause" as of the time that the automobile was stopped.[1] Moreover, in our brief in opposition to the petition for certiorari, we expressly advised this Court (p. 5) that we were adhering to the concession made by the United States Attorney and would argue the case on the same basis on which it was presented to the Court of Appeals. Accordingly, in the argument which follows, we shall again restrict ourselves in this case to the contention that probable cause was shown as of the time that the vehicle was stopped.

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these other purposes, but this is compensated for by the greater importance of the social interest involved."

The distinction suggested in the text does not imply that officers may halt and detain individuals on an arbitrary basis; it means only that less may afford basis for such a limited exercise of police authority than is required when officers go further, *i.e.*, when they conduct a search, make a seizure, or effectuate a full-scale arrest. What is a "reasonable" basis for limited detention and inquiry would have to be determined in the light of the particular circumstances, just as one determines, on the particulars of the case, whether cause for making an arrest was "probable".

[1] Note, in this connection, the dissenting opinion, R. 87.

I. THERE WAS "PROBABLE CAUSE" WHEN THE VEHICLE WAS STOPPED. ACCORDINGLY, THE MOTION TO SUPPRESS WAS PROPERLY DENIED.

It is, of course, unnecessary to have evidence sufficient to convict in order to have probable cause for search, seizure, or arrest. *Carroll* v. *United States*, 267 U.S. 132, 161 162; *Brinegar* v. *United States*, 338 U.S. 160, 175 176; *Husty* v. *United States*, 282 U.S. 694, 700, 701; *Draper* v. *United States*, 358 U.S. 307, 310 312; *Dunbra* v. *United States*, 268 U.S. 435, 441. The inquiry is whether the circumstances known to the officers were such as to warrant a man of reasonable caution in believing that the parties in question were guilty of an offense. In this case, it is a question whether there was probable cause to believe that they were guilty of a federal offense. We think the circumstances here meet that test.

In judging the conduct of officers of the law, the situation must be viewed as it appears to the officers themselves at the time. They are in a position where prompt action may be essential to the achievement of effective law enforcement. They must go on appearances as they then exist, not on what subsequent developments may show. Just as the officers' conduct cannot be justified by what is turned up,[*] so

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See, also, *United States* v. *Hinton*, 148 F. 2d 105, 106 107 (C.A. 2), certiorari denied *sub nom. Cogan* v. *United States*, 326 U.S. 727; *Peoples* v. *United States*, 266 F. 2d 647, 650 (C.A. 5); *Soba* v. *United States*, 191 F. 2d 889, 890 (C.A. 7). For an early case defining probable cause as "circumstances which warrant suspicion," see Chief Justice Marshall's opinion in *Locke* v. *United States*, 7 Cr. 339, 348.

[*] *Byars* v. *United States*, 273 U.S. 28, 29.

also it cannot be condemned because a violation other than the one anticipated is discovered.

There had been a federal offense—theft of liquor from an interstate shipment—committed only the night before, at 24th and Canal Streets in south Chicago. In cruising the neighborhood, the officers saw two men known to them walking opposite the Red Top Tavern at 29th and Wallace Streets. One of these men was petitioner. The other was an employee of a trucking firm who, one of the officers had been informed, had been "implicat[ed] with interstate shipments." The record is not explicit as to the exact nature and extent of the implicating information which had been conveyed to the officer. But the record on this point is meager because the defense objected to the line of inquiry and because the trial judge, apparently out of an overzealous regard for the defendant's right to avoid self-incrimination (R. 21-22). In this posture, petitioner certainly is in no position to argue that the word "implicated" is not to be taken in its commonly understood sense, stated by Webster as follows:

> To bring into intimate or incriminating connection; to involve deeply or unfavorably; as, the evidence *implicates* many in this conspiracy; to be implicated in a crime.

Previous involvement with the law, particularly involvement in a similar offense, may be an important factor in determining whether there is probable cause. *Carroll* v. *United States*, 267 U.S. 132, 160; *Brinegar*

v. *United States*, 338 U.S. 160, 170; *Husty* v. *United States*, 282 U.S. 694, 700.[7]

A further factor, significant from the officers' standpoint, was that the two men were proceeding from a place of business (a tavern) which could be a possible outlet for stolen whiskey. The agents properly decided to follow them to see what they could learn. The events which they thereupon observed plainly called for explanation.

The two men followed an indirect route until they reached an alley. After hesitating at the entrance, they backed up, went a block to the east and entered another alley at that point (R. 19). When they picked up several cartons from a gangway in the alley, it was even more apparent that the situation called for explanation. The premises from which the cartons were obtained were not an ordinary place of sale, and the vehicle into which the goods were loaded was not a business vehicle. Although the unloading of the cartons was not witnessed, the Ford was seen parked in its original spot opposite the tavern shortly after the pick-up, and it was soon re-occupied by the two men, who then repeated the same performance of loading up cartons from the same premises. This was conduct giving ground for more than idle suspicion that petitioner and his companion were guilty of the federal offense the officers were investigating. The occurrences were in the neighborhood of the reported

[7] See, also, *Smith* v. *United States*, 264 F. 2d 169, 172 (C.A. 8); *McCarthy* v. *United States*, 261 F. 2d 473, 474 (C.A. 8); *Larson* v. *United States*, 254 F. 2d 706, 710 (C.A. 8); *Turner* v. *Crump*, 123 F. 2d 810, 812 (C.A. 5).

whiskey theft. The beginning and end of these mysterious journeys was a retail dealer in liquor. One does not ordinarily make deliveries of merchandise to a bar in a private passenger vehicle. And one does not ordinarily make repeated deliveries of merchandise in bulk to a retail liquor dealer unless one is carrying the kind of merchandise which the dealer is licensed to sell.

The officers were thus justified in believing that the time for action had arrived. One delivery had apparently been made, another seemed to be in process. Unless the officers were to ignore a chain of events which appeared inconsistent with any theory of normal and honest behavior and which seemed to point to the solution of the very theft they were investigating, the only practicable alternative was to act immediately and decisively. Procurement of a warrant authorizing search of the automobile was plainly out of question, for it was evident that the cartons might soon be removed, just as the previous load had been. In such circumstances, it suffices if there is reasonable cause to believe that a felony is being committed or that contraband is being transported. *Brinegar* v. *United States*, 338 U.S. 160, 176–177; *Husty* v. *United States*, 282 U.S. 694, 700–701; *Carroll* v. *United States*, 267 U.S. 132, 149; *United States* v. *Lee*, 274 U.S. 559, 563 (vessel); *Cannon* v. *United States*, 158 F. 2d 952, 954 (C.A. 5), certiorari denied, 330 U.S. 839; *Patenotte* v. *United States*, 266 F. 2d 647, 649 (C.A. 5); *Nicholson* v. *United States*, 6 F. 2d 569, 570 (C.A. 7). See, also, the dissenting opinions in *Harris* v. *United States*, 331 U.S. 145, 168; *United*

States v. *Rabinowitz*, 339 U.S. 56, 73; *Davis* v. *United States*, 328 U.S. 582, 609.

As stated at the outset, an arresting officer deals in probabilities, not certainties. *Brinegar* v. *United States*, 338 U.S. 160, 175; *Bell* v. *United States*, 254 F. 2d 82, 86 (C.A.D.C.). Here, the officers had good reason to halt the vehicle and to search (though search for the cartons actually proved unnecessary inasmuch as they were exposed to view). By the same token, they had good reason to seize the goods which, as they believed, were stolen property. As is well settled, contraband discovered during the course of a lawful search is subject to seizure, even though it was not the original object of the search. *Harris* v. *United States*, 331 U.S. 145.

II. THE EVIDENCE SUSTAINS THE JUDGMENT OF CONVICTION

The cartons of Admiral radios taken from the car in which petitioner was riding were introduced in evidence, and it was stipulated that they were of the statutory value, that they were being shipped in interstate commerce, and that they were stolen (R. 68–69, 33). The only issue on the evidence, therefore, is whether the trier of fact was justified in concluding that petitioner was a party to their theft.

Petitioner was observed to be in possession of the cartons of stolen radios. They were in a car in which he was a passenger. The car, moreover, was one over which he had dominion; he had borrowed it from the owner earlier in the day. Finally, he had been observed by the government agents loading the cartons

into the car from the gangway in the alley. The contention, after a finding of guilt, that it cannot be assumed that the cartons found in the car were the same cartons which had been picked up in the alley minutes before, is frivolous. There was no opportunity for an exchange to be made, and no hint in the evidence as to how such a change could have been accomplished. As held in *Wilson* v. *United States*, 162 U.S. 613, 619, "Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence."

It is sometimes stated erroneously that such possession supports a presumption of guilt, but such language is inaccurate, as that would impose upon an accused the burden of proving his innocence. *United States* v. *Allegrucci*, 258 F. 2d 70 (C.A. 3); *United States* v. *Sherman*, 171 F. 2d 619 (C.A. 2). However, unexplained possession does justify the trier of fact in drawing an inference. Here, no shred of evidence in any way tended to give an innocent explanation for the presence in the vehicle of the stolen goods except the statement by Pierotti, in petitioner's presence, that the cartons were in the car when it was borrowed. That was inconsistent with what the officers had seen and it was denied by the owner of the car (R. 36-39). There were other damaging circumstances. Petitioner had untruthfully denied that he had just come from the Red Top Tavern, and he had attempted to dissociate himself from the enterprise

by inventing an alibi (that he had just been picked up) which the officers knew to be false.

The trial judge was fully justified in concluding that all of these circumstances, taken together, amounted to proof beyond a reasonable doubt. As this Court said in *Holland* v. *United States*, 348 U.S. 121, 140, in holding that a judge need not instruct the jury that circumstantial evidence must exclude every reasonable hypothesis other than guilt:

> Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.

The judgment must be sustained if, taking the view of the evidence most favorable to the government, there is substantial evidence to support it. *Glasser* v. *United States*, 315 U.S. 60, 80. That, we submit, is clearly this case.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the court below should be affirmed.

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